(24,539)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 795.

OSCAR M. LANCASTER AND PATRICK M. KERR, APPELLANTS,

vs.

KATHLEEN OIL COMPANY, JOSIAH BROWN, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1915.

1 Pleas and proceedings before the honorable Ralph E. Campbell, Judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the following cause:

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, and Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

2 In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, and Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Bill of Complaint.

Now comes Oscar M. Lancaster and Patrick M. Kerr, the plaintiffs above named, and state and allege:

1. That plaintiffs are citizens of the State of Oklahoma, and reside in the City of Tulsa, in the said state and defendant, Kathleen Oil Company, is a corporation organized and existing under and by virtue of the laws of the State of Oklahoma, with its principal place of business in the City of Tulsa, in the State of Oklahoma, and is a citizen and inhabitant of the Eastern District of the same State; defendant Josiah Brown, Katie Brown, Ada Brown, John Brown, Susie Brown, and defendant Josiah Brown, guardian, are all citizens of the State of Oklahoma, and reside in Okfuskee County, in said State.

3 2. That the matter in controversy in this cause, an oil and gas mining lease and leasehold, exceeds in value, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), and arises under the constitution and laws of the United States, and the right, title, interest and cause of action of the plaintiffs depends upon one construction of Section 9, of the Act of Congress approved May 27th, 1908, entitled "an act for the removal of restrictions from part of the lands of allotees of the Five Civilized

Tribes, and for other purposes," (35 Stat. L. 312) and the constitutionality of the said Section of the said Act.

3. That the following described lands, to wit:

The Southwest Quarter (S. W. ¼) of the Northeast Quarter (N. E. ¼) of Section Nine (9) of Township Seventeen (17) North, Range Seven (7) East, of the Indian Meridian, in Creek County, Oklahoma, were allotted to Lizzie Brown, deceased, a citizen of the Creek Nation of Indians, of three quarters Indian blood, in her lifetime, as her homestead allotment, exclusive of a surplus allotment, as a citizen of the said Nation of Indians, as a part of her distributive share of the lands of the said Nation of Indians, pursuant to the Acts of Congress and agreements between the United States and the said Indian Nation relative to the division of the lands of the said nation in severalty among the citizens there; and in her lifetime, on or about the 27th day of March A. D., 1903, a homestead allotment deed or patent, duly approved by the Secretary of the Interior of the United States, was executed and delivered to the said Lizzie Brown by the Principal Chief of the Creek Nation, conveying the said lands to the said Lizzie Brown in fee simple.

4. That the said Lizzie Brown departed this life on or about the 12th day of March, 1912, leaving surviving as her heirs at
4 law her husband, Josiah Brown, an Indian citizen of the Creek Nation of one quarter Indian blood, and Katie Brown, Ada Brown, John Brown and Susie Brown minor children of the said Lizzie Brown deceased, all of whom are defendants to this action; and of such children Katie Brown and Ada Brown were born prior to March 4th, 1906, and John Brown and Susie Brown subsequent to such time, and Ada Brown, Susie Brown and Katie Brown are females and are less than eighteen years of age, and John Brown is a male and less than twenty-one years of age.

5. That defendant, Josiah Brown is, and for many years past has been, a resident of the State of Oklahoma, and, upon due and proper proceedings had in the County Court of Okfuskee County, of which County the said minors were at that time residents, was on the 22nd day of March, 1912, duly appointed guardian of the persons and estates of the said Katie Brown, Ada Brown, John Brown and Susie Brown. That the said Josiah Brown duly qualified as such guardian on the 22nd day of March, 1912, and ever since that time has been and still is such guardian, and the said guardianship matter has at all times since said appointment been pending in the said court.

6. That on the 4th day of April, A. D., 1912, defendants, Josiah Brown, Katie Brown, Ada Brown, John Brown and Susie Brown were the owners in fee simple as tenants in common of the lands hereinabove described, and they still are the owners thereof; and on that day to wit, the 4th day of April A. D., 1912, the plaintiffs and defendants entered into a written agreement whereby the
5 said defendants granted, demised, leased and let to the plaintiffs the lands above described for the sole and only purpose of mining and operating thereon for mineral oil and natural gas, for a term of five years from the said date, and as long thereafter as oil or gas should be produced therefrom by the plaintiffs. That as

a consideration for such lease, in addition to the royalty of one-eighth part of the oil produced and saved from the premises, the sum of One Hundred Sixty Dollars ($160.00) was paid by plaintiffs to the grantors or lessors at the time of the execution and delivery of the said lease agrement, which sum was a fair and adequate consideration or bonus for the said lease, at such time; and the statement in the lease of a consideration of One Dollar is not a statement of the true consideration, which was as hereinbefore set forth. That under the terms of the said lease, plaintiffs agreed to complete a well on the said leased premises within one year from the date thereof, or, in lieu thereof, to pay to defendants, lessors, at the rate of One Dollar per acre per annum for each additional year the completion of such a well should be delayed from the end of the first year; and the said lease granted to the plaintiffs the exclusive right to prospect for, produce and sell mineral oil and mineral gas from the said premises during the term thereof. That the said lease agreement was executed to plaintiffs by Josiah Brown in his own right, and on behalf of defendants, Katie Brown, Ada Brown, John Brown and Susie Brown, minors, by Josiah Brown, as legal guardian of the said minors, who was duly and legally authorized thereunto by the County Court of Okfuskee County, Oklahoma, upon
6 petition filed therein by the said guardian, by orders duly made and entered, duly authorizing and approving the said lease agreement.

7. That the said lease agreement aforesaid was duly filed for record by the plaintiffs in the office of the Register of Deeds of Creek County, Oklahoma, on the 18th day of April, 1912, at nine o'clock a. m., and was thereafter recorded in Volume 80, at page 617 of the records of said county.

8. That by virtue of the said lease agreement the plaintiffs have and claim the exclusive right to prospect for, operate for, and produce and sell the oil and gas in and under the said lands for and during the term of the said lease, which said right and interest is of great value, to-wit, of the value of One Hundred Thousand Dollars ($100,000.00) and upwards.

9. That thereafter, and on or about the 2nd day of June, 1912, and while the lands above described were owned as aforesaid, and the said lease of plaintiffs was in full force and of record, the said Josiah Brown in his own right and as Guardian for the said minors, made and entered into an agreement with the defendant, Kathleen Oil Company, which purported to lease and let for oil and gas mining purposes the said lands above described, theretofore granted, leased and let to plaintiffs as aforesaid, to the said Kathleen Oil Company. That the purported lease was afterwards approved by the Secretary of the Interior of the United States, and purports to run for a term of ten years from date of such approval thereof, and as long thereafter as oil or gas is found in paying quantities.

10. That the said purported agreement with the Kathleen Oil Company was filed for record in the office of the Register of Deeds of Creek County, Oklahoma, on the 12th day of March,
7 1913, and recorded in volume 89 at page 25 of the records of Creek County, Oklahoma.

11. That defendant Kathleen Oil Company, entered into said lease agreement with full knowledge of the lease of the plaintiffs, and with full knowledge of the exclusive rights of the plaintiffs in the said lands, for the development and production of oil and gas, and claims adverse to the plaintiffs, the exclusive right to develop, mine and produce mineral oil and natural gas, and sell the same from the said lands to the exclusion of the plaintiffs, which claims of the said defendant are, and it is without any right whatever, and the said defendant is without estate, right, title or interest in the said lands, and has no right to explore for and mine oil and gas therefrom.

12. That on or about the 11th day of September, A. D., 1912, and before they had learned of the lease to defendant, Kathleen Oil Company, the plaintiffs entered upon the said premises and made locations for wells upon the four several corners of the said tract and entered upon preparations to immediately begin the drilling or boring of a well thereon. That before beginning the drilling of the said well, plaintiffs discovered that a second lease had on date of June 2nd A. D., 1912, been made to defendant, Kathleen Oil Company, and that lease had been approved by the Secretary of the Interior as hereinafter set out. Thereupon drilling operations were postponed by plaintiffs pending an effort to remove the cloud of the said lease to Kathleen Oil Company, and in that behalf application was made to the Honorable Secretary of the Interior, who refused to cancel his approval of the said purported lease to the said defendant. That for that reason plaintiffs have not completed a well but in lieu thereof, have paid the rentals of One Dollar per

8 acre as aforesaid, in advance, and in reliance upon the said lease agreement, and have kept and performed all of the covenants, conditions and agreements of said lease upon their part to be kept and performed and stand now ready, willing and able to continue the performance thereof and to forthwith proceed to the development of oil and gas on said premises, and the completion on the said premises of such a number of oil or gas wells as may be necessary to fully develop and protect the same.

13. That the defendant, Kathleen Oil Company, notwithstanding the protest of plaintiffs, and notwithstanding the said Kathleen Oil Company and its principal officers at the time had full knowledge of the lease contract of plaintiffs and the rights, interest and claim of the plaintiffs under their said lease contract, and that the plaintiffs had and claimed thereunder the exclusive right to develop and mine oil and gas thereon, has entered upon and taken possession of the said premises hereinbefore described, has prevented and still prevents plaintiffs obtaining possession thereof for the purpose of drilling or boring thereupon for oil and gas, and has bored and drilled wells thereon, producing natural gas in large quantities, and is drilling or about to drill other wells for mineral oil and natural gas thereupon with the purpose and intention of removing and selling such oil and gas, and has removed and sold, and is about to remove and sell oil and gas from said premises of the value of many thousands of dollars, the exact amount of which is unknown to plaintiffs,

all in violation of the exclusive rights and interest of the plaintiffs under their said lease contract; and the said defendant, Kathleen Oil Company is continuing to bore and drill wells thereon for the purpose of producing more oil and gas and of removing and selling the same, and will exhaust the deposit of said oil and gas mineral deposits under the said lands unless rest-ained and enjoined by this Honorable Court, to the irreparable loss and damage of the plaintiffs. That the continuous mining, production and sale by said defendant, Kathleen Oil Company of the oil and gas from the said lands, is and will be a continuing trespass upon and against the rights and property of the plaintiffs, for which plaintiffs are without adequate remedy at law, and unless afforded relief in equity they will be without remedy and the acts of the said defendant, Kathleen Oil Company, will work irreparable injury to plaintiffs.

14. That plaintiffs have at all times been, and now are, willing and able to go on with the prompt performance in good faith of all the covenants, agreements, conditions and provisions of their said lease contract, and develop and operate the said lands for oil and gas in good faith and in a workmanlike manner to the fullest extent and operate the said lands as long as oil or gas may be produced therefrom, and pay the royalties reserved in said lease, all of which acts and things plaintiffs offer to do; and plaintiffs would have entered upon the said lands long ago and developed and operated thereon for oil and gas but for the fact that the defendant, Kathleen Oil Company, was in possession thereof and excluded plaintiffs from possession.

15. That plaintiffs have never at any time had any intention of surrendering their lease, leasehold or rights under their said lease agreement and for themselves, their heirs, executors, administrators and assigns, hereby waive and surrender any right of cancellation, surrender or release, contained in the said lease agreement, in their favor, and for themselves, their heirs, executors, administrators and assigns, agree to perform any acts or act with reference to the development and operation for oil and gas on the said premises that the court may decree they ought in equity to do and perform, and agree to be bound by any conditional decree that may be made by the court granting relief to plaintiffs upon such terms and conditions as to the court may seem just and proper; and further tender the performance of any decree for the re-imbursement of the said defendant, Kathleen Oil Company, for sums expended in the development and operations of the said premises for oil and gas, and which have in any wise enhanced the value of the said premises, and plaintiffs here and now tender to said defendant such sums, the amount of which is known to defendant, Kathleen Oil Company, but is unknown to plaintiffs.

16. That plaintiffs made their agreement of lease hereinbefore mentioned, upon a construction of the Constitution and Laws of the United States, that the said lands descended to the heirs of the said Lizzie Brown, deceased, above named, free from any restrictions against the leasing thereof for oil and gas mining purposes; and the validity of the lease of the plaintiffs aforesaid, and their right

to develop and operate thereon for oil and gas depends upon the question whether the oil and gas mining lease agreement made as aforesaid and without the approval of the Secretary of the Interior of the United States, is a valid contract, and necessarily involves a construction of the Act of Congress of May 27th, 1908, entitled "an act for the removal of restrictions from part of the lands of the allottees of the Five Civilized Tribes," and for other purposes, (35 Stat. L. 312), and particularly of Section 9 of said Act, and presents a federal question for the determination of this court.

11

17. That the Congress of the United States was at the time of the approval of the said Act of May 27, 1908, without constitutional power to restrict and limit the right of the said Lizzie Brown to transmit all of her allotted lands by inheritance to her general heirs, according to the laws of descent in force *of* Olkahoma, at the time of her death, and the provisions of the second Proviso of Section 9 of the said Act whereby it is atempted to, after the death of the said Lizzie Brown, — withhold the beneficial estate from the general heirs of said Lizzie Brown by making the said land inalienable for a long period of time after her death, without the approval of the Secretary of the Interior of the United States, for the use and benefit of certain heirs and to the exclusion of other heirs of the same degree, constitutes a depravation of property without due process of law, in violation of Article V of the Amendment of the Constitution of the United States, and is in violation of Section 2 of Article IV of the Constitution of the United States, guaranteeing to each citizen all privileges and immunities of citizens of the several states, and is in violation of Article X of the Amendment of the Constitution of the United States, reserving to the States alone the power to enact laws of descent; and if the said Proviso of Section 9 of the said Act be construed as rendering the lease of the plaintiffs void for want of the approval of the Secretary thereto, such Proviso is in violation of the several Articles of the Constitution as aforesaid, and necessarily calls for further construction of the Constitution and laws of the United States, and presents further Federal questions.

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18. That plaintiffs would have instituted this action earlier but for the fact that its lease agreement and other papers were in the office of the Secretary of the Interior where they had been filed in an effort to secure the disapproval of the said lease to the Kathleen Oil Company, and plaintiffs had been unable to secure the return thereof, or any of said papers until within thirty days prior to the filing of this bill.

In consideration whereof, and for as much as plaintiffs have no sufficient remedy at law for the wrong done and threatened to be done, and that the remedy at law will afford plaintiffs no protection against the trespass and waste done or being done, or threatened to be done for the reasons hereinbefore stated, and is only relievable in a court of equity. Plaintiffs to the end that they may obtain the relief to which they are justly entitled in the premises, pray:

I.

That plaintiffs be granted a writ of injunction commanding the said defendants, and each of them, their servants, employees
13 and workmen, and all persons under their authority, direction or control to absolutely desist and refrain from entering upon the premises hereinabove described, for the purpose of prospecting, drilling or mining for oil or gas, or for the purpose of producing or selling the same, or commanding such persons from interfering in any manner whatsoever with plaintiffs in conducting operations for the discovery of oil and gas and its production from the said lands above described, and that the said persons be perpetually enjoined from setting up or asserting any claim to the oil and gas deposits under or in said lands or the right to develop, mine, drill for or remove the same.

II.

That the defendant Kathleen Oil Company, be required to account to plaintiffs for all natural gas and mineral oil mined, extracted or removed from the said lands, and set forth a full, true and just account of all oil and gas produced by it, or those in its employ, from the said lands, and that plaintiffs have judgment against such defendant for the highest market value thereof.

III.

That the defendants and each of them, pending the final hearing of this action be restrained from the commission of any of the acts or doings hereby sought to be enjoined.

IV.

That a subpœna be granted, directed to defendant, Kathleen Oil Company, a corporation, Josiah Brown, Katie Brown, Ada
14 Brown, John Brown, Susie Brown, and Josiah Brown, as guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, commanding them and each of them at a certain time and under certain penalties personally, to appear before this Honorable Court and then and there, full, true, direct and perfect answers make unto this bill of complaint, but not under oath, an answer under oath being expressly waived, and abide and perform such order and decree in the premises, as to the court shall seem proper and required by the principles of equity.

V.

And that plaintiffs may have such other and further relief, preliminary and final, as to the court may seem meet and proper, and which equity may require.

ABEY & TUCKER,
Tulsa, Okla., Attorneys for Plaintiffs.
W. F. TUCKER.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Oscar M. Lancaster, being first duly sworn upon oath state, that I am one of the plaintiffs in the above entitled cause; that I have read and understand the foregoing bill of complaint, and that the statements and allegations thereof are true.

OSCAR M. LANCASTER.

Subscribed and sworn to before me this 30th day of March, 1914.

[SEAL.] OSCAR E. HEFFNER,
Notary Public.

My commission expires March 1, 1917.

15 9056.

EXHIBIT "A."

Oil and Gas Lease.

Agreement, made and entered into the 4th day of April, A. D., 1912, by and between Josiah Brown, in his own right, and Josiah Brown as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, minors, of Dustin, Oklahoma, parties of the first part, and O. M. Lancaster and P. M. Kerr party of the second part, lessees.

Witnesseth: That the said parties of the first part, for and in consideration of the sum of One Dollar to them in hand well and truly paid, by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the said party of the second part to be paid, kept and performed, have granted, demised, leased and let and by these presents do grant, demise, lease and let unto the said second party their heirs, executors, administrators, successors or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, powers, stations and structures, thereon to produce and take care of said products, all that certain tract of land situate in the County of Creek State of Oklahoma, described as follows, to wit:

The Southwest Quarter (¼) of the Northeast Quarter (¼) of Section Nine (9), Township Seventeen (17) North, Range Seven (7) East, containing forty (40) acres, more or less,

It is agreed that this lease shall remain in force for a term of 5 years from this date and as long thereafter as oil or gas
16 or either of them, is produced from said land by the party of the second part, their heirs, administrators, executors, successors or assigns;

In consideration of the premises the said party of the second part covenants and agrees:

1st. To deliver to the credit of the first parties their heirs or assigns, free of cost, in the pipe line to which it may connect its wells, the equal ⅛ part of all oil produced and saved from the leased premises.

2nd. To pay the first parties Three Hundred ($300.00) Dollars each year in advance, for the gas from each well where gas only is

found, while the same is being used off the premises, and the first parties to have gas free of cost from any such well for 5 stoves and 10 inside lights in the principal dwelling house on said land, during the same time by making their own connections with the well.

3rd. The party of the second part agrees to complete a well on said premises within one (1) year from the date hereof, or pay at the rate of One Dollar ($1.00) per acre, for each additional year such completion is delayed from the time above mentioned for the full completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rent under this provision during the remainder of the term of this lease.

The party of the second part shall have the right to use
17 free of cost, gas, oil and water produced on said land for its operations thereon, except water from wells of first party.

When requested by first party the second party shall bury its pipe lines below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn of said premises.

Second party shall pay for damages caused by them to growing crops on said land.

The party of the second part shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

The party of the second part shall not be bound by any change in the ownership of said land until duly notified of any such change, either by notice in writing duly signed by the parties to the instrument of conveyance, or by receipt of the original instrument of conveyance, or a duly certified copy thereof.

All payments which may fall due under this lease may be made directly to first parties or deposited by second parties to 1st parties credit in the Oklahoma State Bank at Dustin, Oklahoma.

For and in consideration of Five ($5.00) Dollars, the receipt of which is hereby acknowledged, the first parties hereby expressly waive their right to demand or declare a cancellation or a forfeiture of this lease, except for the non-payment of rentals when due, and further agree that the party of the second part, their successors or assigns shall have the right at any time on payment of One Dollar to the parties of the first part, their heirs or assigns to
18 surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine.

All covenants and agreements herein set forth between the parties hereto shall extend to their successors, executors, administrators and assigns.

Witness the following signatures and seals:

JOSIAH BROWN. [SEAL.]
JOSIAH BROWN, [SEAL.]
Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors.

Witness:
W. M. McLENNAN.
CHARLIE DICKSON.

STATE OF OKLAHOMA,
County of Hughes, ss:

Be it Remembered, That on this 4th day of April, in the year of our Lord one thousand nine hundred and twelve, before me, a Notary Public, in and for said County and State, personally appeared Josiah Brown, in his own right and Josiah Brown as guardian of Katie Brown, Ada Brown, John Brown, Susie Brown, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my official signature and affixed my notarial seal the day and year first above written.

[SEAL.] W. M. McLENNAN,
Notary Public.

My commission expires Aug. 5th, 1912.

19 The foregoing lease examined and approved April 4th, 1912.

[C. C. SEAL.] W. A. HUSER,
County Judge, Okfuskee Cou., Okla.

Indorsement.

STATE OF OKLAHOMA,
Creek County, ss:

This instrument was filed for record on the 18 day of April, A. D. 1912, at 9 O'clock a. m., and duly recorded in Book 80, at page 617.

H. H. ADAMS,
Register of Deeds.

Endorsed: Filed Apr. 1, 1914, R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

20 And, to-wit, on the 1st day of April, A. D. 1914, Subpœna was issued in this cause for the defendant Kathleen Oil Company, a corporation, which subpœna with the Marshal's Return thereon is in words and figures as follows:

Chancery Subpœna.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

The United States of America, to Kathleen Oil Company, a Corporation (P. J. White, President, Tulsa, Oklahoma), Greeting:

We command you and every one of you, that you appear before our Judge of our District Court of the United States of America for the Eastern District of Oklahoma, at the City of Muskogee, in said

District, on or before the twentieth day after service of this writ, excluding the day thereof, to file answer or other defense to the Bill of Complaint of Oscar M. Lancaster and Patrick M. Kerr this day filed in the Clerk's office of said Court in said City of Muskogee, then and there to receive and abide by such judgment, and decree as shall then and thereafter be made, upon pain of judgment being pronounced against you by default. To the Marshal of the Eastern District of Oklahoma to execute and make due return of this writ, on the 21st day of April, 1914.

Witness, The Hon. Ralph E. Campbell, Judge of said Court this 1st day of April, A. D. 1914.

R. P. HARRISON, *Clerk,*
[SEAL.] By H. E. BOUDINOT,
Deputy Clerk.

MEMORANDUM.—The above defendant is notified that unless he file answer or other defense in the Clerk's office of said Court at the City of Muskogee aforesaid, on or before the twentieth day after service, excluding the day thereof, the bill of complaint will be taken pro confesso and a decree entered accordingly.

R. P. HARRISON, *Clerk.*
[SEAL.] By H. E. BOUDINOT,
Deputy Clerk.

21 *United States Marshal's Return.*

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I received this writ on the 10th day of April, 1914, and executed the same as follows, to-wit: I served said writ on the within-named defendant Kathleen Oil Company on Apr. 11 1914, *191–*, by delivering a true copy thereof to H. F. Sinclair, Secretary at Tulsa, Oklahoma, the president, chairman of board of directors, or board of trustees, or either chief officer, its cashier, treasurer, clerk, or managing agent not being found in my district, and the said H. F. Sinclair, on whom service was made, was the person having charge of the office and usual place of business of said corporation.

B. A. ENLOE, JR.,
United States Marshal.
By E. H. HUBBARD, *Deputy.*

Fees $2.00.

Endorsed: Filed Apr. 14, 1914, R. P. Harrison, Clerk United States District Court, Eastern District of Oklahoma.

And, to-wit, on the 1st day of April, A. D. 1914, Subpœna was issued in this cause for defendants, which subpœna with the Marshal's Return thereon is in words and figures as follows:

Chancery Subpœna.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

The United States of America, to Josiah Brown, Katie Brown, Ada Brown, John Brown, and Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, all of Dustin, Oklahoma, Greeting:

22 We command you and every one of you, that you appear before our Judge of our District Court of the United States of America for the Eastern District of Oklahoma, at the City of Muskogee, in said District, on or before the twentieth day after service of this writ, excluding the day thereof, to file answer or other defense to the Bill of Complaint of Oscar M. Lancaster and Patrick M. Kerr, this day filed in the Clerk's office of said Court in said City of Muskogee, then and there to receive and abide by such judgment and decree as shall then and thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Eastern District of Oklahoma to execute and make due return of this writ, on the 21st day of April, 1914.

Witness, the Hon. Ralph E. Campbell, Judge of said Court, this 1st day of April, A. D. 1914.

R. P. HARRISON, *Clerk.*
[SEAL.] By H. E. BOUDINOT,
Deputy Clerk.

MEMORANDUM.—The above named defendant is notified that unless he filed answer or other defense in the Clerk's office of said Court, at the City of Muskogee aforesaid, on or before the twentieth day after service, excluding the day thereof, the bill of Complaint will be taken pro confesso and a decree entered accordingly.

R. P. HARRISON, *Clerk.*
[SEAL.] By H. E. BOUDINOT,
Deputy Clerk.

U. S. Marshal's Return.

EASTERN DISTRICT OF OKLAHOMA, *ss:*

Received the within writ April 13th, 1914, and executed
23 the same as follows, to-wit: Served on the within named Defendants Personally Served on Josiah Brown 4 miles north of Dustin, April, 14, 1914, Served on Katie Brown 4 miles north of Dustin, April 14, 1914; Served on Ada Brown 4 miles north of Dustin, April 14, 1914; Served on John Brown 4 miles north of Dustin, April 14, 1914; Served on Susie Brown 4 miles north of Dustin, April 14, 1914; Served on Josiah Brown as Guardian of

Katie Brown, Ada Brown, John Brown and Susie Brown, April 14, 1914.

B. A. ENLOE, JR., *U. S. Marshal.*
By JOHN T. MONTGOMERY, *Deputy.*

Endorsed: Filed Apr. 17, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 2nd day of July, A. D. 1914, the Plaintiffs filed Petition for Appointment of Guardian Ad Litem, which is in words and figures as follows:

In Equity. No. 2041.

In the United States District Court for the Eastern District of Oklahoma.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Petition for Appointment of Guardian ad Litem for Infant Defendants.

24 The petition of Oscar M. Lancaster and Patrick M. Kerr, plaintiffs in this action, respectfully shows:

First. That an action has been commenced in this court between the parties above named.

Second. That the summons issued in said cause has been served upon defendants, Katie Brown, Ada Brown, John Brown and Susie Brown, as appears by the summons and proof of service thereof now on file in this court.

Third. That defendants, Ada Brown, Katie Brown and Susie Brown are females and infants less than eighteen years of age, and the defendant, John Brown is a male and is less than twenty-one years of age, and that, although more than twenty days have elapsed since the service of the summons herein upon each of the said infant defendants, they have neglected and each of said defendants have neglected to apply for an appointment of a guardian ad litem in this action, for and on behalf of all or either of said infant defendants, and that no application for the appointment of such guardian ad litem has been made by the guardian, relative or friend of said minors, or either of them.

Fourth. That the said infants all reside with their father and general guardian, Josiah Brown, near Dustin, in Okfuskee County, Oklahoma.

Wherefore, Your petitioners pray that some suitable and competent

person be appointed guardian ad litem for each of said defendants to defend the said action.

ABY & TUCKER,
Attorneys for Plaintiffs.

Endorsed: Filed Jul- 2, 1914. R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

25 And, to-wit, on the 2nd day of July, A. D. 1914, the same being one of the days of a Special Session of the United States District Court for the Eastern District of Oklahoma, sitting at Muskogee, Oklahoma. Court met pursuant to adjournment. Present and presiding the Honorable Ralph E. Campbell, Judge. Among the proceedings had on this day is the following:

In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Order Appointing Guardian ad Litem of Infant Defendants.

This matter coming on for hearing on the 2d day of July, 1914, before the Honorable Ralph E. Campbell, Judge of said Court, upon the application of Oscar M. Lancaster and Patrick M. Kerr, plaintiffs herein, for the appointment of guardian ad litem in this cause for defendants, Katie Brown, Ada Brown, John Brown and Susie Brown, and it appearing that Katie Brown, Ada Brown and Susie Brown are females and under the age of eighteen years, and that defendant, John Brown, is a male and under the age of twenty-one years, and the court being satisfied that sufficient grounds exist for the appointment of a guardian ad litem herein, and it appearing
26 to the court that Josiah Brown is a competent and responsible person, and that he has consented to act as such guardian.

It is ordered that the said Josiah Brown be and he hereby is appointed guardian ad litem for the said Katie Brown, Ada Brown, John Brown and Susie Brown, and is authorized and directed to appear and defend the said action on their behalf, and in behalf of each one of them.

It is further ordered that said guardian file an answer or other appropriate pleading on behalf of said minors, and each of them, within twenty days from this date, and thereafter, observe all orders of the court in relation to his said trust.

RALPH E. CAMPBELL, *Judge.*

Endorsed: Filed Jul- 2, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Okla.oma.

And, to-wit, on the 7th day of December, A. D. 1914, the defendants filed Motion to Dismiss for want of Jurisdiction, which is in words and figures as follows:

In the District Court of the United States for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER et al., Plaintiffs,
vs.
KATHLEEN OIL CO. et al., Defendants.

Defendants' Motion to Dismiss for Want of Jurisdiction.

27 Come now defendants by their counsel, the minor defendants by their guardian ad litem and counsel, and leave of court having been obtained to withdraw their respective answers and raise the question of jurisdiction, do hereby move the court to dismiss this cause for want of jurisdiction in this court, in that it appears that there is no diversity of citizenship nor any federal question necessarily involved.

Wherefore defendants pray that plaintiffs' cause be dismissed for want of jurisdiction in this court.

EDWARD H. CHANDLER,
GEO. S. RAMSEY,
Attorneys for Defendants and Guardian ad Litem.

Endorsed: Filed Dec. 7, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 7th day of December, A. D. 1914, the following proceedings were had in this cause. Honorable Ralph E. Campbell, Judge presiding.

In the United States District Court for the Eastern District of Oklahoma.

No. 2041. E.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
THE KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, Katie Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Journal Entry.

28 This — came *come* on for hearing on this 7th day of December, 1914, the same being a regular day of a term of

this Court, at Muskogee, Oklahoma, counsel of record for the plaintiffs and defendants appearing.

Whereupon, counsel for defendants requested the Court for leave to withdraw the answer filed for defendants, and file and present to the Court a motion to dismiss this case for the want of jurisdiction in this court, which request of defendants to withdraw their answers with leave to file a motion calling in question the jurisdiction of this Court, was this day allowed, and said motion to dismiss for want of jurisdiction filed on this date; and, thereupon, the said motion came on for argument, and the Court having heard counsel for the plaintiffs and defendants, and duly considered the motion, is of the opinion that this court has no jurisdiction, in that the Bill filed by plaintiffs fails to disclose any jurisdiction in this Court, and the moton to dismiss for want of jurisdiction is sustained, and the plaintiffs' suit dismissed at plaintiffs' costs. The plaintiffs excepted to the judgment and order of the Court sustaining the said motion to dismiss, and except to the order of the Court dismissing plaintiffs' case.

Made and ordered entered this 7th day of December, 1914.

RALPH E. CAMPBELL, *Judge.*

O. K.
ABY & TUCKER.
CHANDLER.
RAMSEY.

Endorsed: Filed Dec. 7, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

29 And, to-wit, on the 31st day of December, A. D. 1914, the Plaintiffs filed Petition for Allowance of Appeal, together with their Assignment of Errors, which Appeal was allowed by the Court. Said Petition for Allowance of Appeal, Order allowing same and Assignment of Errors are in words and figures as follows:

In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Petition for Appeal.

To the Honorable Ralph E. Campbell, District Judge:

The above named plaintiffs, feeling aggrieved by the decision and holding that this Court has no jurisdiction of this action and

the decree rendered and entered in accordance with such decision in the above entitled cause on the 7th day of December, A. D. 1914, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of
30 the United States, sitting at Washington in the District of Columbia, under the rules of such Court in such cases made and provided, and that it be by the court certified to the said Supreme Court that the question of jurisdiction of this Court was the sole question considered and decided by said Court in rendering the decree of dismissal herein.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

HULETTE F. ABY,
WILLIAM F. TUCKER,
CHAS. W. GRIMES,
Solicitors for Plaintiffs.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Five Hundred Dollars.
Done at Muskogee, Oklahoma, December 31st, 1914.

RALPH E. CAMPBELL,
United States District Judge.

Endorsed: Filed Dec. 31, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Assignment of Errors.

31 Come now the plaintiffs in the above entitled cause and file the following assignment of errors upon which they will rely for their prosecution of appeal in the above entitled cause, from the decree made by this Honorable Court on the 7th day of December A. D. 1914.

First. That the United States District — for the Eastern District of Oklahoma erred in sustaining the motion of defendants to dismiss this cause for want of jurisdiction and holding that the court had no jurisdiction of the cause.

Second. That the said Court erred in holding that the Bill of plaintiffs did not, by essential and proper allegations, disclose a case arising under the Constitution, laws or treaties of the United States.

Third. That the Court erred in holding that the allegations of the bill of complaint, with reference to the status of the lessors of plaintiffs as Indians, and setting out the laws of the United States, a construction of which was by plaintiffs asserted to be necessary to determine their rights, were non-essential and improper averments that could not be considered in determining the existence of a Federal question.

Fourth. That the Court erred in entering judgment in favor of defendants and against plaintiffs on the Motion to dismiss for want of jurisdiction, and dismissing plaintiffs' bill and quashing the proceedings.

Wherefore, Plaintiffs pray that the said decree be reversed and that the said Court of the Eastern District of Oklahoma be ordered to enter a decree reversing its decision in said cause.

HULETTE F. ABY,
WILLIAM F. TUCKER,
CHAS. W. GRIMES,
Solicitors.

Endorsed: Filed Dec. 31, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

32 And, to-wit, on the 2nd day of January A. D. 1915, the Plaintiffs filed their Appeal Bond, which is in words and figures as follows:

In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Bond on Appeal.

Know all men by these presents: That we, Oscar M. Lancaster and Patrick M. Kerr, as principals, and James E. Duffey and Wiley I. Stewart, as sureties, acknowledge ourselves to be jointly indebted

to Kathleen Oil Company, a corporation, Josiah Brown, Katie Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown as guardian of Katie Brown, Ada Brown, John Brown and Susie Brown, minors, appellees in the above cause, in the sum of Five Hundred ($500.00) Dollars, conditioned that, whereas, on the 31st day of December, A. D. 1914, in the District Court of the United States for the Eastern District of Oklahoma, in a suit pending in that Court, wherein Oscar M. Lancaster and Patrick M. Kerr were plaintiffs and Kathleen Oil Company, a corporation, Josiah Brown, Katie Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown as guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, minors, were defendants, numbered on the equity docket as No. *2401,* a decree was rendered against said Oscar M. Lancaster and Patrick M. Kerr, and said Oscar M. Lancaster and Patrick M. Kerr having obtained appeal to the Supreme Court of the
33 United States, and filed a copy thereof in the office of the Clerk of the Court to reverse said decree, and a citation directed to said appellants, citing and admonishing them to be and appear in said Supreme Court of the United States, now, if said Oscar M. Lancaster and Patrick M. Kerr shall prosecute their appeal to effect and answer all costs if they fail to make good their plea, then the above obligation to be void; otherwise remain in full force and virtue.

OSCAR M. LANCASTER,
PATRICK M. KERR,
Principals.
JAMES E. DUFFEY,
WILEY I. STEWART,
Sureties.

STATE OF OKLAHOMA,
County of Tulsa, ss:

On the 2nd day of January, A. D. 1914, personally appeared before me Oscar M. Lancaster, Patrick M. Kerr, James E. Duffey, and Wiley I. Stewart, respectively known to me to be the persons described in and who executed the foregoing instrument, and they each for himself acknowledged to me that they executed the same as their free act and deed for the purposes therein set forth and said James E. Duffey and Wiley I. Stewart, being respectively by me duly sworn, upon oath states, each for himself that he is a resident and householder of the County of Tulsa and State of Oklahoma, and that he is worth the sum of $500.00 over and above his debts, legal liabilities, and property exempt from execution.

JAMES E. DUFFEY.
WILEY I. STEWART.

34 Subscribed and sworn to before me this 2nd day of January, 1915.

[SEAL.] DAVID M. HAMMAT,
Notary Public.

My Com. Expires 2/26/17.

Approved, January 2d, 1915.

RALPH E. CAMPBELL,
United States District Judge.

Endorsed: Filed Jan. 2, 1915, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 31st day of December, A. D. 1914, the following proceedings were had in this cause. The Honorable Ralph E. Campbell, Judge presiding.

In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Certificate.

This cause came on to be heard on the 7th day of December, A. D. 1914 upon the Motion of Defendants to dismiss the bill and cause for the reason, as stated in said Motion to Dismiss, that the Bill of Complaint did not properly state a cause of action arising under the Constitution or laws of the United States.

35 Now, therefore, it is certified that the question of jurisdiction of this Court upon the grounds heretofore stated, to-wit: whether or not the said Bill of Complaint stated a cause of action arising under the Constitution or laws of the United States, was the issue upon which the case was decided. I having found that the essential and appropriate allegations of the cause of action asserted in said Bill of Complaint did not disclose a case arising under the Constitution or a law or treaty of the United States, and that this Court was for that reason without jurisdiction, it was the duty of the Court to dismiss the bill, which was accordingly done; and I further certify that it is the only question of law upon the pleadings and process for the decision of the Supreme Court of the United States; and that the certificate was granted at the term in which the judgment in the case was entered.

RALPH E. CAMPBELL,
United States District Judge.

Endorsed: Filed Dec. 31, 1914, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

And, to-wit, on the 9th day of January, A. D. 1915, the Plaintiffs filed their præcipe for transcript of record, which is in words and figures as follows:

In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,

vs.

36 KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, Katie Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Præcipe.

To the Clerk of said court.

SIR: You will please prepare transcript on appeal to the Supreme Court of the United States, heretofore allowed in the above entitled cause, and incorporate in said transcript the following portion of the records, and filed of your office in said cause, to-wit:

First. Bill of Complaint of the Plaintiffs.

Second. Subpœnas and returns thereon by the officers serving same.

Third. Petition for appointment of guardian ad litem, filed by the plaintiffs.

Fourth. Order appointing guardian ad litem for infant defendants.

Fifth. Motion to dismiss case for want of jurisdiction of the Court, filed by the defendants.

Sixth. Order and Judgment of the Court sustaining motion to dismiss and dismissing this case rendered by the Court.

Seventh. Petition of Plaintiffs for appeal to the Supreme Court of the United States.

Eighth. Assignment of Errors filed by the Plaintiffs.

37 Ninth. Order allowing appeal. (Endorsed on Petition for Appeal.)

Tenth. Appeal Bond of the Plaintiffs.

Eleventh. Certificate of the Court that the only question involved on appeal is that of jurisdiction.

Twelfth. Copy of this præcipe and acknowledgment of service of copy hereof on counsel for defendants.

HULETTE F. ABY,
WILLIAM F. TUCKER,
Solicitors for Plaintiffs.

The undersigned solicitors for defendants and guardian ad litem, appellees in the above entitled cause, hereby acknowledge service

of a copy of the within Præcipe, made on *him* this 8th day of January, A. D. 1915.

EDWARD H. CHANDLER,
GEO. S. RAMSEY,
Solicitor- for Defendants.

Endorsed: Filed Jan. 9, 1915, R. P. Harrison, Clerk U. S. District Court, Eastern District of Oklahoma.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, R. P. Harrison, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of so much of the record and proceedings in the case of Oscar M. Lancaster, et al., vs. Kathleen Oil Company, a corporation, et al., No. 2041, Equity, as was ordered by præcipe of counsel filed herein.

I further certify that the citation attached hereto, and re-
38 turned herewith, is the original citation issued in this cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Muskogee, Oklahoma, this 16th day of January, A. D. 1915.

[Seal of the United States District Court, Eastern District of Oklahoma.]

R. P. HARRISON, *Clerk,*
By H E. BOUDINOT, *Deputy.*

[Two 5-cent United States internal-revenue stamps, canceled R. P. H., 1/16/15.]

39 In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Certificate.

This cause came on to be heard on the 7th day of December, A. D. 1914 upon the Motion of defendants to dismiss the bill and cause for the reason, as stated in said Motion to dismiss, that the Bill of Complaint did not properly state a cause of action arising under the Constitution or laws of the United States.

Now, therefore, it is certified that the question of jurisdiction of this Court upon the grounds heretofore stated, to-wit: whether or not the said Bill of Complaint stated a cause of action arising under the Constitution or laws of the United States, was the issue
40 upon which the case was decided. I having found that the essential and appropriate allegations of the cause of action asserted in said Bill of Complaint did not disclose a case arising under the Constitution or a law or treaty of the United States, and that this Court was for that reason without jurisdiction, it was the duty of the Court to dismiss the bill, which was accordingly done; and I further certify that it is the only question of law upon the pleadings and process for the decision of the Supreme Court of the United States; and that the certificate was granted at the term in which the judgment in the case was entered.

RALPH E. CAMPBELL,
United States District Judge.

41 [Endorsed:] No. 2041-Y. In the District Court. Oscar M. Lancaster and Patrick M. Kerr, Plaintiffs, vs. Kathleen Oil Company et al., Defendants. Certificate. Filed Dec. 31, 1914, R. P. Harrison, Clerk U. S. District Court. Aby & Tucker, Tulsa, Oklahoma, Attorneys for Plaintiffs.

42 In the United States District Court for the Eastern District of Oklahoma.

In Equity. No. 2041.

OSCAR M. LANCASTER and PATRICK M. KERR, Plaintiffs,
vs.
KATHLEEN OIL COMPANY, a Corporation; JOSIAH BROWN, KATIE Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Defendants.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Kathleen Oil Company, Josiah Brown, Katie Brown, Ada Brown, John Brown, Susie Brown, Josiah Brown, as Guardian of Katie Brown, Ada Brown, John Brown, and Susie Brown, Minors, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, thirty days after the date of this Citation, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Eastern District of Oklahoma from a final decree signed, filed and entered on the 7th day of December, A. D. 1914, in that cer-

tain suit, being in Equity Number 2014, wherein Oscar M.
43 Lancaster and Patrick M. Kerr are plaintiffs and you are defendants, to show cause, if any there be, why the decree rendered against the plaintiffs, as in said order allowing said appeal mentioned, should not be corrected and why justice should not be done the parties in that behalf.

Witness the Honorable Ralph E. Campbell, United States District Judge for the Eastern District of Oklahoma, this 2nd day of January, A. D. 1915.

RALPH E. CAMPBELL,
United States District Judge.

We, the undersigned, as attorneys for the above named defendants and Josiah Brown guardian ad litim and Katie Brown, Ada Brown, John Brown and Susie Brown, Minors, hereby acknowledge and accept service of the within and foregoing Citation on us by delivery to us of true copy thereof, on behalf of the said defendants and the said Guardian ad litim, this 31st day of December, A. D. 1914.

EDWARD H. CHANDLER,
GEO. S. RAMSEY,
Attorneys for Defendants and Guardian ad Litim.

44 [Endorsed:] No. 2041-Y. In the District Court. Oscar M. Lancaster and Patrick M. Kerr, Plaintiffs, vs. Kathleen Oil Company et al., Defendants. Citation. Aby & Tucker, Tulsa, Oklahoma, Attorneys for Plaintiffs.

Endorsed on cover: File No. 24,539. E. Oklahoma D. C. U. S. Term No. 795. Oscar M. Lancaster and Patrick M. Kerr, appellants, vs. Kathleen Oil Company, Josiah Brown, et al. Filed January 28th, 1915. File No. 24,539.

FILED
APR 3 1916
JAMES D. MAHER
CLERK

No. 335

In the

Supreme Court of the United States

October Term, 1915.

OSCAR M. LANCASTER and PATRICK H. KERR,
Appellants

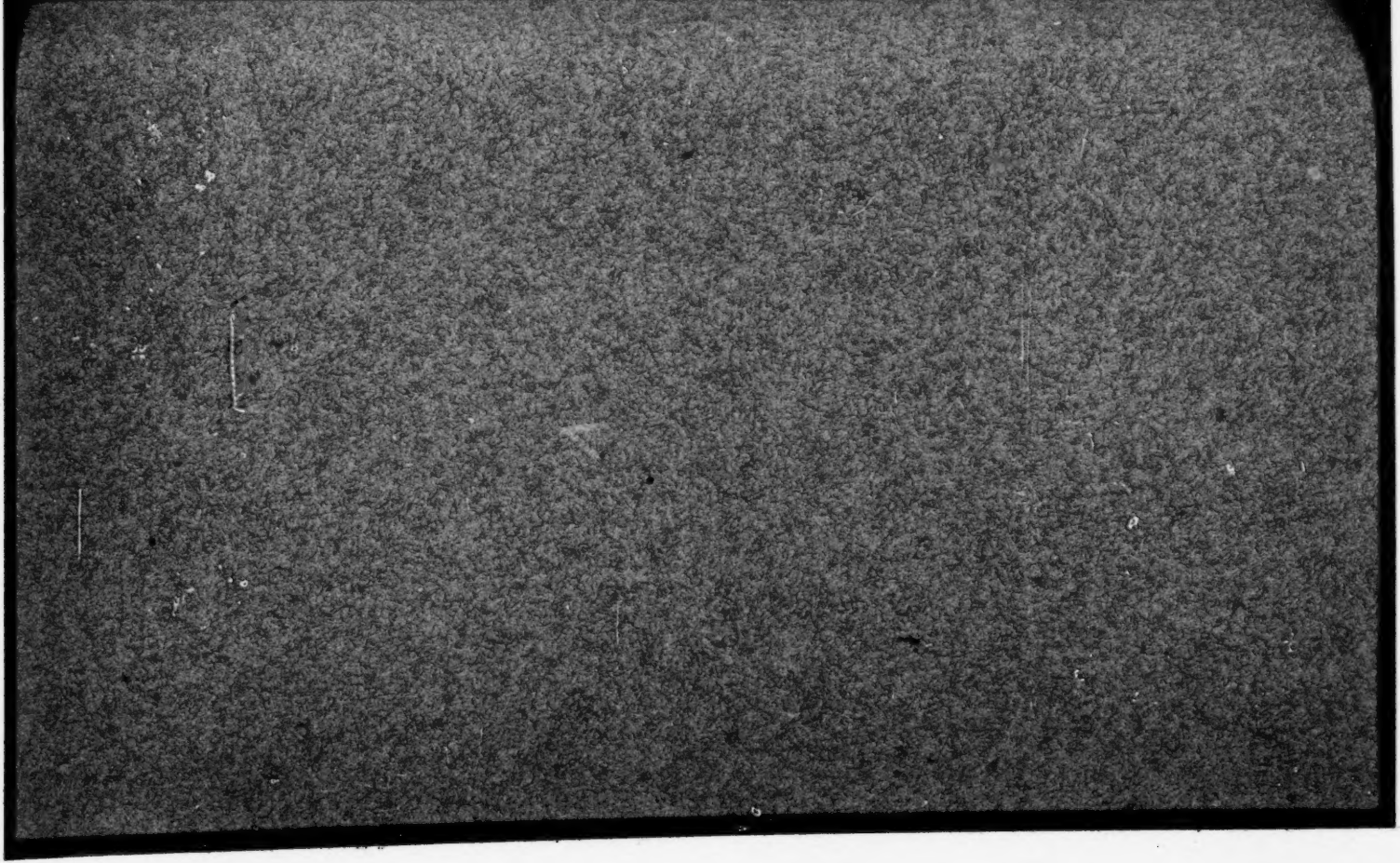
vs.

KATHLEEN OIL COMPANY, JOSIAH BROWN, KATIE BROWN, ADA BROWN, JOHN BROWN, SUSIE BROWN AND JOSIAH BROWN as Guardian of KATIE BROWN, ADA BROWN, JOHN BROWN, and SUSIE BROWN, Minors
Appellees

BRIEF AND ARGUMENT ON BEHALF OF APPELLANTS.

WILLIAM F. TUCKER,
HULBERT F. ABY,
Attorneys for Plaintiffs.

Cantrell & Cantrell, Statutory Law Book Printers, 304 St. Louis, Tulsa, Okla.



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ARGUMENT:

Proposition I ---------- 11

The character of the interest of the lessee in an Oklahoma oil and gas mining lease is an incorporeal hereditament, a chattel real, and passes only the privilege to explore, and this rule of property will be recognized and given effect by the Federal Courts.

Duff v. Keaton, 39 Okla. 92, 124 Pac. 291 ---------- 12

Frank Oil Company v. Belleview Gas & Oil Co., 29 Okla. 719, 119 Pac. 260 ---------- 12

Guffey v. Smith, 237 U. S. 101 ---------- 13

Proposition II ---------- 13

The owner of an oil and gas mining lease, under which no development has been made, cannot maintain ejectment thereon in the courts of Oklahoma.

Frank Oil Co. v. Belleview Gas & Oil Co., 29 Okla. 719, 119 Pac. 260 ---------- 14

Kolachny v. Galbreath, 26 Okla. 722, 110 Pac. 902 ---------- 13

Proposition III ---------- 14

Courts of equity will protect exclusive rights and licenses, privileges and easements, where claimed for a valuable consideration, by injunction.

Alpers v. City & County of San Francisco, 32 Fed. 503 ---------- 15

Brush-Swan Elect. Co. v. Brush Elect. Co., 41 Fed. 163 ---------- 22

Duff v. Russell, 133 N. Y. 678, 32 N. E. 622 ---------- 16

Franklin Tel. Co. v. Harrison, 145 U. S. 459 ---------- 15

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Phila. Ball Club v. Lajoie, 202 Pa. St. 210---- 21

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Singer Sewing Mch. Co. v. Union Buttonhole Co., 1 Holmes 253, Federal Cases No. 12904 ---------- 19

Steinan v. Cinn. Gas Light etc. Co., 27 N. E. 545 ---------- 18

Western Union Tel. Co. v. Union Pac., 3 Fed. 423 ---------- 21

Proposition IV ---------- 23

Where under the laws and decisions of the State no remedy at law exists in the State courts, the United States courts, following in actions at law the local laws and modes of procedure, can grant no such remedy and the owner of a valid oil and gas mining lease on lands in such State may maintain an action to enjoin those claiming the right and about to operate for and produce and sell the oil and gas therefrom under a later and similar lease from the same lessors, and in such action the court will determine the rights of the two lease claimants; and if the title of the plaintiff be found valid, plaintiff will be entitled to injunction, discovery and accounting.

Allegheny Oil Co. v. Snyder, 106 Fed. 764----- 26

Bettman v. Harness, 42 W. Va. 433; 36 L. R. A. 566 ---------- 28

Brown v. Spilman, 155 U. S. 665 ---------- 25

Coosaw Mining Co. v. South Carolina, 144 U. S. 550 ---------- 26

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Erhardt v. Boaro, 113 U. S. 527, 28 L. Ed. 1113 26

Franklin Tel. Co. v. Harrison, 145 U. S. 459 26

Friend v. Mallory, 52 W. Va. 53, 43 S. E. 114 26

Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N. E. 219 28

Guffey v. Smith, 237 U. S. 101 26

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Proposition V 29

In an action for injunction and accounting, brought by the owners of an oil and gas mining lease while out of possession of the leased premises, and against the lessors and lessees of a subsequent lease where the lessees of the second lease have entered thereunder and are about to mine and remove the oil and gas underlying the lands, under the second lease, the allegations of the bill as to the character and derivation of the title of the plaintiff and the character and derivation of the claim and title asserted by the defendant, in connection with the nature of the acts done thereunder, are usual, proper and essential in such a bill.

Blakeslee v. Mo. Pac. Ry. Co., 43 Nebr. 61, 61 N. W. 118 31

Chicago City Ry. Co. v. General Elect Co., 74 Ill. App. 465 30

Coffeyville Mining & Gas Co. v. Citizens, 55 Kan. 173 32

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Shulthis v. McDougal, 225 U. S. 561 ---------- 34

Stillwell v. Adams, 29 Ark. 346 ---------- 33

Story's Eq. Pl. 505 ---------- 33

Wilson Cypress v. Del Pozo y Marcos, 236 U. S. 635 ---------- 35

Proposition VI ---------- 36

In an action by the lessee under an oil and gas lease covering Oklahoma lands, for injunction, discovery and accounting, brought against a second lessee of the same lands, the plaintiff, by pleading the character and derivation of his title under an act of Congress and the character and derivation of the claim and title asserted by the defendant, and the facts in relation thereto, and it being alleged that a decision of the controversy between the parties depends upon the construction of certain specified acts of Congress of the United States, or parts thereof applicable to the case, and that certain provisions of the acts of Congress upon which the adverse claim and title rest were violative of provisions of the Constitution of the United States specified in the bill, there is presented by appropriate allegations a controversy arising under the Constitution and laws of the United States, within the purview of 36 Stat. at L. 1091, of which the Dis-

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trict Court of the United States has jurisdiction.

Bankers Mutual v. Minneapolis, St. Paul, 192 U. S. 371, 381 ---------- 39

Cohens v. Virginia, 6 Wheat. 264, 379---------- 39

Little York, etc., Water Co. v. Keyes, 6 Otto 199 ---------- 37

Osborn v. Bank, 9 Wheat. 739, 824-825---------- 37

Shulthis v. McDougal, 225 U. S. 561---------- 37

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In the

Supreme Court of the United States

October Term, 1915.

No. 795.

OSCAR M. LANCASTER and PATRICK M. KERR, - - - - - - - - - - - - - - Appellants

vs.

KATHLEEN OIL COMPANY, JOSIAH BROWN, KATIE BROWN, ADA BROWN, JOHN BROWN, SUSIE BROWN AND JOSIAH BROWN as Guardian of KATIE BROWN, ADA BROWN, JOHN BROWN and SUSIE BROWN, Minors - - - - - Appellees

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Brief and Argument on Behalf of Appellants.

Statement of the Case.

This is an appeal from the District Court of the United States for the Eastern District of Oklahoma directly to this court, from an order of that court dis-

missing the plaintiffs' bill in equity, the District Court holding the bill did not disclose jurisdiction in the court in that it did not, by its appropriate allegations, state a cause of action arising under the Constitution or laws of the United States.

The action was by the owners of an oil and gas mining lease covering a tract of land in Creek County, Oklahoma, to enjoin operation thereon by the defendant, Kathleen Oil Company, under a later and similar lease and to obtain a discovery and accounting in respect of oil and gas produced and sold in the court of operation, by such defendant—in effect to determine the rights of the parties under the two conflicting leases, which rights are asserted to depend upon the validity under the Constitution, and construction of certain specified laws of the United States, and remove from the title of the plaintiffs the cloud of the second lease.

The bill in substance alleges that the lands covered by the leases in question are the homestead allotment of Lizzie Brown, deceased, and were allotted to her as a citizen of the Creek Tribe of Indians, of three-quarters Indian blood; that they were conveyed to her in her lifetime and on or about the 27th day of March, 1903, by patent from the Creek Nation, approved by the Secretary of the Interior of the United States; that Lizzie Brown, the allottee, died on the 12th day of March, 1912, and on the 4th day of April, 1912, the said lands were leased to the

plaintiffs for oil and gas mining purposes by her heirs, her husband in his own right and as guardian of four minor children, two of whom were born prior and two subsequent to March 4, 1906, the said guardian being authorized thereunto and the lease being approved by the County Court of Okfuskee County, Oklahoma, having jurisdiction of the guardianship of said minors, and being properly filed for record in Creek County, Oklahoma, on April 18, 1912, but never approved by the Secretary of the Interior of the United States; that plaintiffs made entry on said lands, made locations for wells and made preparations for the drilling of wells, but desisted upon learning of a lease to the defendant Kathleen Oil Company, clouding their title. That they have paid the rentals provided in said lease, in lieu of drilling a well and have kept and performed all of the covenants, conditions and agreements of said lease on their part to be kept and performed, and that they claim the exclusive right thereunder to prospect and operate for and to produce and sell the oil and gas in and under the said lands; that they are ready, willing and able to carry out the development of said lands under their lease and do full equity in the premises.

The bill also sets out the asserted title of the defendant Kathleen Oil Company, and that such title was derived by an oil and gas mining lease made to the Kathleen Oil Company, covering the same lands, by the same lessors, subsequent to that of

plaintiffs, on date the 2nd day of June, 1912, afterward approved by the Secretary of the Interior of the United States, which second lease, it is asserted, the said defendant took with full and actual knowledge of the plaintiffs' prior lease, as well as with constructive notice by reason of the record thereof; and with such knowledge and over the protest of plaintiffs and in disregard of their rights, entered upon the said premises and are producing natural gas in large quantities and are about so to produce mineral oil, with the purpose and intention of removing and selling the same and exhausting the deposits of oil and gas, and that their lease is a cloud upon the title of plaintiffs.

The bill further alleges in substance that the plaintiffs made their agreement of lease upon a construction of the Constitution and laws of the United States that the lands covered thereby descended to the heirs of Lizzie Brown, deceased, free from any restriction against the leasing thereof for oil and gas mining purposes, and under the Constitution and laws of the United States the said lease was valid without the approval of the Secretary of the Interior; and that the validity of said plaintiffs' lease and their rights thereunder depend completely upon a construction of the Constitution and laws of the United States, the question being whether the plaintiffs' lease, unapproved by the Secretary of the Interior, is a valid contract as against the subsequent lease of defendant Kathleen Oil Company, approved

by the said Secretary of the Interior, and that the solution of which controversy between the parties to the two leases involves a construction of the act of Congress of May 27, 1908, "An Act for the Removal of Restrictions from Part of the Lands of Allottees of the Five Civilized Tribes and for Other Purposes" (35 Stat. L. 312), and particularly Section 9 of said act and the validity of the second proviso of said Section 9 of said act, if construed to prevent the execution by the heirs of any oil and gas mining lease without approval of the Secretary of the Interior, in regard to the constitutionality of which provision of the act the bill in substance alleges that Congress was without constitutional authority to restrict or limit the right of the allottee, Lizzie Brown, to transmit all of her allotted lands by inheritance to her general heirs, according to the laws of descent in force in Oklahoma at the time of her death, and that the second proviso of Section 9 of such act of Congress, whereby it is attempted to, upon the death of such allottee, withhold the beneficial estate in her property from the general heirs of said allottee by making the lands inalienable for a long period of time after her death, without approval of the Secretary of the Interior of the United States, for the use and benefit of heirs born since March 4, 1906, and to the exclusion of other heirs of the same degree, born prior to that date, is violative of Section 2 of Article IV of the Constitution of the United States, guaranteeing to each citizen all the privileges and immu-

nities of citizens of the several States, constitutes a deprivation of property without due process of law, in violation of Article X of the Amendments of the said Constitution; and is in violation of Article X of the said Constitution reserving to the States the power to enact laws of descent for lands within the territorial limits of the State; that adjudication of the title and rights of the parties to this controversy necessarily calls for a construction of the Constitution and laws of the United States.

The bill then asserts the continuing and irreparable nature of the damage by reason of the acts of the defendants and that plaintiffs are without remedy at law, and prays for injunction against further mining by defendants or interference with plaintiffs, an accounting for all natural gas or mineral oil mined, and all proper equitable relief. (Printed Record, pages 1-7.)

To this petition defendants directed a motion to dismiss the cause, on the ground that there was no diversity of citizenship and no Federal question was involved. (Printed Record, page 15.)

The District Court sustained such motion and dismissed the bill (Printed Record, pages 15-16), holding that the bill did not, by its essential and necessary averments, disclose a case arising under the Constitution, laws or treaties of the United States, and that the allegations of the bill with reference to the status of the lessors as Indians, and asserting

that the controversy between the parties could only be determined by the construction of certain specified laws of the United States, and an adjudication as to their validity, were non-essential, improper averments and not to be considered in determining the existence of a Federal question. (Printed Record, page 20.)

From this judgment an appeal was taken to this court and certificate of the District Court was made that the only question to be determined was that of jurisdiction. (Printed Record, page 20.)

In the judgment of dismissal and on the foregoing record the plaintiffs assigned the following errors:

Assignments of Error.

First: That the United States District Court for the Eastern District of Oklahoma erred in sustaining the motion of defendants to dismiss this cause for want of jurisdiction and holding that the court had no jurisdiction of the cause.

Second: That the said court erred in holding that the bill of plaintiffs did not, by essential and proper allegations, disclose a case arising under the Constitution, laws or treaties of the United States.

Third: That the court erred in holding that the allegations of the bill of complaint, with reference

to the status of the lessors of plaintiffs as Indians, and setting out the laws of the United States, a construction of which was by plaintiffs asserted to be necessary to determine their rights, were non-essential and improper averments that could not be considered in determining the existence of a Federal question.

Fourth: That the court erred in entering judgment in favor of defendants and against plaintiffs on motion to dismiss for want of jurisdiction, and dismissing plaintiffs' bill and quashing the proceedings. (Printed Record, pages 17, 18.)

Argument.

While there are four Assignments of Error, they in fact present a single error of the court—that of dismissing the bill on the ground that it did not state a cause of action arising under the Constitution or laws of the United States. It was contended by counsel in the court below that the allegations of the bill of the claim and title of the defendants under which they had entered on the leased premises and the allegations of the acts of Congress, which it would be necessary to construe to determine the conflicting claims of the parties, were unnecessary and improper and could not be considered by the court in determining whether or not the bill stated a cause of action cognizable by the United States District Court, it be-

ing there conceded that if such allegations were proper in the bill, it did in fact state such jurisdictional matter; while the appellants contend, and contended below that such allegations were proper in the bill. The controversy thus presented, reached by the errors assigned, depends for its determination on several propositions of law which, for the purposes of argument, we have stated in six points, as follows:

I.

The character of the interest of the lessee in an Oklahoma oil and gas mining lease is an incorporeal hereditament, a chattel real, and passes only the privilege to explore, and this rule of property will be recognized and given effect by the Federal Courts.

II.

The owner of an oil and gas mining lease, under which no development has been made, cannot maintain ejectment thereon in the courts of Oklahoma.

III.

Courts of equity will protect exclusive rights and licenses, privileges and easements, where claimed for a valuable consideration, by injunction.

IV.

Where under the laws and decisions of the State no remedy at law exists in the State courts, the United States courts, following in actions at law the local laws and modes of procedure, can grant no such remedy; and the owner of a valid oil and gas mining lease on lands in such State may maintain an action to enjoin those claiming the right and about to operate for and produce and sell the oil and gas therefrom under a later and similar lease from the same lessors, and in such action the court will determine the rights of the two lease claimants; and if the title of the plaintiff be found valid, plaintiff will be entitled to injunction, discovery and accounting.

V.

In an action for injunction and accounting brought by.the owners of an oil and gas mining lease while out of possession of the leased premises, and against the lessors and lessees of a subsequent lease where the lessees of the second lease have entered thereunder and are about to mine and remove the oil and gas underlying the lands, under the second lease, the allegations of the bill as to the character and derivation of the title of the plaintiff and the character and derivation of the claim and title asserted by the defendant, in connection with the nature of the

acts done thereunder, are usual, proper and essential in such a bill.

VI.

In an action by the lessee under an oil and gas lease covering Oklahoma lands, for injunction, discovery and accounting, brought against a second lessee of the same lands, the plaintiff, by pleading the character and derivation of his title under an act of Congress and the character and derivation of the claim and title asserted by the defendant, and the facts in relation thereto and it being alleged that a decision of the controversy between the parties depends upon the construction of certain specific acts of Congress of the United States, or parts thereof applicable to the case, and that certain provisions of the acts of Congress upon which the adverse claim and title rest were violative of provisions of the Constitution of the United States specified in the bill, there is presented by appropriate allegations a controversy arising under the Constitution and laws of the United States, within the purview of 36 Stat. at L. 1091, of which the District Court of the United States has jurisdiction.

Of these in their order:

I.

The character of the interest of the lessee in

an Oklahoma oil and gas mining lease is an incorporeal hereditament, a chattel real, and passes only the privilege to explore, and this rule of property will be recognized and given effect by the Federal Courts.

The character of the right granted by the lessee in question is not open to serious controversy. The Supreme Court of Oklahoma, in the case of *Duff* v. *Keaton,* 39 Okla. 92, where the matter came squarely before them for determination, and in speaking of an oil and gas lease similar to that asserted by the plaintiff in this case, say:

> "The rule seems to be settled in this jurisdiction that the grant of an exclusive privilege to go upon land for the purpose of exploring for oil or gas, the grantor to receive part of the oil or gas mined, does not vest in the grantee any estate in the land or oil or gas, but is merely a license or grant; such a lease creating an incorporeal hereditament only, and the lessee having no right or title to the oil or gas lying under the surface of the land. This, under our statute, is simply a chattel real."

So, in *Frank Oil Company* v. *Belleview Gas and Oil Company,* 29 Okla. 719, it was held that such an oil and gas mining lease passes nothing except the "right to explore" therefor under the terms of the contract.

Thus it would appear to be settled in Oklahoma that the interest of the lessee under the oil and gas

mining lease is an incorporeal hereditament, and a chattel real, passing only the privilege to explore under the terms of the lease.

That in adjudging the character of an estate created by a contract executed within a State, the courts of the United States will look no further than the decision of the highest court of such State. If such court has determined it, this court will adopt that determination. This proposition requires no argument. A recent case in point both as to facts and law is *Guffey* v. *Smith*, 237 U. S. 101.

II.

The owner of an oil and gas mining lease under which no development has been made, cannot maintain ejectment thereon in the courts of Oklahoma.

There is no doubt, by reason of decisions of the Supreme Court of Oklahoma, that ejectment cannot be maintained by a lessee under an oil and gas mining lease similar to the lease of the plaintiff, the plaintiff having never discovered or produced oil thereunder. This matter was considered by the Supreme Court in *Kolachny* v. *Galbreath*, 26 Okla. 722, where the court stated in the course of the opinion:

> "Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in

the ground, but of such a part as the grantees may find, and passes nothing that can be the object of ejectment or other real action."

The above extract of opinion was cited and approved in *Frank Oil Company* v. *Belleview Gas and Oil Company,* 29 Okla. 719, and the rule has never been reversed or modified.

III.

Courts of equity will protect exclusive rights and licenses, privileges and easements, where claimed for a valuable consideration, by injunction.

The foregoing proposition is important in this appeal, since the character of the relief to which plaintiffs are entitled is not now open for determination, only as it furnishes a rule and guide as to the nature of the pleading and what constitutes appropriate allegations of the bill. Hence, if a bill in equity for injunction be appropriate, essential and usual, the allegations of such a bill in good pleading are proper in the bill in this case and may be considered in determining whether the bill shows a controversy arising under the laws of the United States.

The rule that injunction is appropriate and indeed the only adequate remedy for the enforcement and preservation of such rights, has been applied in a variety of situations. Thus where an adequate remedy exists at law for the enforcement of a license,

privilege or easement, equity will, by injunction, prevent those claiming rights inconsistent therewith interfering with such persons in the exercise of such privileges, etc. This rule was applied in the case of *Joy* v. *St. Louis*, 138 U. S. 46, where a prayer for injunction to restrain the adverse party from interfering with the plaintiff in the exercise of its privilege to use a certain right of way, was held to ask for all the relief necessary. To like effect was *Franklin Telegraph Co.* v. *Harrison*, 145 U. S. 459, where injunction was granted to prevent the Telegraph Company interfering with the other party in the use of certain telegraph wire which, by contract, such party had been granted the privilege of using upon certain terms.

Outside of the decisions of this court there are many examples of the exercise of the use of the writ of injunction to protect such rights, which are rights and oftimes valuable rights, even though they may be incorporeal hereditaments.

Thus in *Alpers* v. *City & County*, 32 Fed. 503, the plaintiff has been granted by the City Council of San Francisco the exclusive privilege of having and removing all carcasses of dead animals for a period of twenty years. The city sought to grant the privilege of removal to other parties. Plaintiff brought injunction. His contract with the city provided that in event he failed to carry out the terms of the agreement to remove the animals he should pay the city

$500.00 liquidated damages. Thus he could at any time, upon payment of the $500.00, have been released from the contract. It was held that the plaintiff was entitled to injunction to restrain the city from violating its contract in granting him a license.

In the case of *Manhattan Manufacturng Company* v. *New Jersey Stock Yards*, 23 N. J. Eq. 161, a stock yard company had granted plaintiff exclusive privilege of having and removing certain material from the stock yards. The stock yard company sought to make a contract with another party and the court, upon application, enjoined interference by the party first granted the exclusive privilege, on the ground that such party had no adequate remedy at law, and the court enjoined any violation of the covenants of the contract granting the exclusive privilege.

So in the case of *Duff* v. *Russell*, 133 N. Y. 678, Lillian Russell had agreed to sing at plaintiff's opera house during a certain season, and sing nowhere else. She attempted to make other contracts with other people to sing at other opera houses. It was shown that her services had a peculiar value, and the damages of the breach of contract could not be ascertained, she being a singer of great note. She was enjoined by the court from singing at any other opera house during the term of the contract with the plaintiff. This, notwithstanding the fact that her con-

tract with the plaintiff had expired when the case was finally decided.

In the case of *Goddard* v. *Wilde,* 17 Fed. 845, in which the defendant had agreed that the plaintiff should have exclusive right to sell within the United States the Wilde Patent Button, it was contended that because the court could not enforce such a contract against the plaintiff and force him to sell the buttons, that plaintiff should not be decreed specific performance by enjoining defendant. The court say that while in that case there might possibly have been a remedy at law, in this class of cases the remedy in equity is more practical and efficient.

And further state in the course of the opinion as follows:

> "Nor is the objection sound that, because the court may not be able to decree a specific performance in this case, an injunction will not lie. In *Singer Manufacturing Company* v. *Union Buttonhole & Embroidery Co.,* before cited, this question was carefully considered by Judge LOWELL, and the conclusion reached that the court can restrain a party from selling in violation of his agreement, though it may be unable to enforce a specific performance of it. When speaking of the agreement as the grant of an exclusive license to sell the patented machine, the court observes: 'And it has never yet been doubted that the court could restrain all persons whether they were acting with or without notice, and whether bound by contract or not, from trespassing on such a title.' "

In the case of *Steinau* v. *Cinn. Gas Light etc. Co.* (Ohio), 27 N. E. 545, being a case where specific performance was denied because of the existence of an adequate remedy at law, the court say, quoting from Pomeroy on Contracts:

> " 'It is a familiar doctrine that if the right to a specific performance of a contract exists at all, it must be mutual. The remedy must be alike attainable by both parties to the agreement. To this general rule the courts have made an exception where peculiar skill and labor are involved, and this apparently, upon the ground that the element of personal and artistic skill renders the chances of damages at law uncertain and conjectural. * * * Of this class the case of *Lumley* v. *Wagner*, 1 De Gex. M. & G. 604, is perhaps the leading case. * * * Later cases have followed this, and the exception appears to be quite well established.' "

In Pom. Eq. Rem. Vol. 2, Sec. 773, is the following language:

> "Courts of equity often speak of enforcing an option as if such enforcement were an apparent exception to the rule of mutuality. In fact, mutuality has nothing to do ordinarily with contracts of option. The option is only a binding offer. The promiser has parted with the right to withdraw his offer. There is nothing to enforce in equity before the exercise of the option, as the promisee has already obtained his right—to have the offer kept open. Upon the exercise of the option, i. e., the acceptance of the offer, and the filing of the bill by the promisee would be one way of exercising it—the option ceases as an option, and equity has an ordinary

> bilateral contract to deal with. Thus it is usually said that an option to renew a lease is enforceable at the will of the lessee having the option. In fact, the lessee must first exercise his option, and then he has a binding contract for the renewal, and not an option. It can make no difference that defendant has tried to withdraw the option. He bound himself not to do so."

The *Singer Sewing Machine Co.* v. *Union Buttonhole Co.*, 1 Holmes 253, Fed. Cas. No. 12904, is a case where plaintiff had contracted with defendant to purchase and sell their machines. The contract stipulated that in case the Singer Sewing Machine Company failed to abide by the agreement, they were to forfeit their agency.

Suit was for specific performance and injunction. Injunction was granted, notwithstanding it was admitted by the court that the Singer Sewing Machine Company could have abandoned the contract at any time, and the only penalty would have been the forfeiture of their agency to sell defendant's machine. The court say in part:

> "If the court cannot order a contract for the making of buttonhole machines to be specifically enforced by reason of the impossibility of superintending the details of such a business, it does not follow that the bill may not be retained as an injunction bill. It was formerly thought that an injunction bill would not be granted to restrain the breach of any contract, unless the contract was of such a character that a court of equity could fairly enforce the performance of it on both sides. Upon this ground there were

many decisions refusing to interfere with contracts for personal service however flagrant might be the breach of them (citing several cases) in which the courts refused to restrain actors and authors from violating their contracts, because they could not oblige them to specifically keep them. But all these cases were overruled by one of the ablest chancellors who has adorned the woolsack, in *Lumly* v. *Wagner*, 1 De Gex. M. & G. 616. I think the fair result of the later cases may be thus expressed. If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason or policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it. It seems to me that the case comes easily within this rule. The court cannot, perhaps, superintend the performance of a contract to manufacture machines, but it can restrain defendants from selling in violation of their agreement.

The case may be looked at from another view. * * * This is not only an agreement between the parties, that certain things shall be done by them, but it is also the grant of an exclusive license to complainants to sell the patented machines, and it has never yet been doubted that the court could restrain all persons, whether they were acting with or without notice, and whether they were bound or not, from trespassing on such a title.

There are innumerable cases where the party seeking performance is no longer bound to any-

thing, having paid the consideration at the outset, or performed on his part, or when the plaintiff does not rest on a contract wholly executory to which this doctrine does not apply."

In *Philadelphia Ball Club* v. *Lajoie*, 202 Pa. St. 210, the plaintiff sought to enjoin the defendant, who was a star second baseman, from violating his contract to play with the Philadelphia Ball Club another season, if his services were desired. The contract provided the the club could terminate his contract on ten days' notice. The court in the syllabus say:

"3. Lack of mutuality of remedy will not prevent an injunction against breach of a contract to render exclusive services as a ball player because the options of renewals and of terminating the contract on ten days' notice rest only with the employer, where such options expressly form part of the consideration for which the compensation is paid—at least after the contract has been partly performed."

In the case of *Western Union Telegraph Company* v. *U. P. Railroad Co.*, 3 Fed. 423, the Western Union Telegraph Company sought to restrain the railway company from interfering with its lines which it had placed on the right-of-way of the railway company pursuant to a contract. The defendant contended that it should not be enjoined for the reason, among others, that the plaintiff, by reason of the character of the business, could not be forced to maintain the telegraph service and that it would be

impossible for the court to enforce specific performance on the part of the telegraph company, and for that reason should not enjoin the railroad; that there was no mutuality of remedy. The court say:

> "That the contract is in its nature incapable of being enforced by a decree of specific performance, is very clear (*Marble Co.* v. *Ripley*, 10 Wall. 399), but it does not follow that a party to such a contract can have no injunction to restrain its breach. It is now settled, I think, by the decided weight of authority, that in such cases, although the affirmative specific performance of the contract was beyond the power of the court, its performance will be negatively enforced by enjoining its breach. Pomeroy on Specific Performances, Sections 22, 25, 310, 311 and 312, and cases cited."

In the case of *Brush-Swan Electric Co.* v. *Brush Electric Company*, 41 Fed. 163, Section 6 of the syllabus reads:

> "Where specific performance of an agreement giving a license and exclusive agency within certain territory for sale of a patented article can not be enforced, the bill may be retained, and an injunction and account ordered; the defendant being by the contract prohibited from selling in the specified territory."

In concluding the opinion the court said:

> "By the terms of the contract the defendant is especially prohibited from selling any designated territory or any of the machinery in question. The exclusive right to do this is given to the complainant. If, from the nature of the

> agreement, the court cannot give the profits of its business to the complainant, it should at least restrain the defendant from reaping them, particularly where, as in this cause, the remedy at law is wholly inadequate."

Exclusive privileges granted in leases will be protected by injunction.

Thus the exclusive privilege of shooting game upon certain premises during the tenancy will be protected by injunction. Also the exclusive right or privilege of selling certain goods on leased premises during a certain term will likewise be protected by injunction, and likewise the violation of all manner of exclusive rights and privileges will be enjoined. 2 High on Injunctions, 3rd Ed., Secs. 1150, 1151; and easements of all kinds are protected by injunction. 1 High on Injunction, 3rd Ed., Sec. 850 *et seq.*

IV.

Where under the laws and decisions of the State no remedy at law exists in the State courts, the United States courts, following in actions at law the local laws and modes of procedure, can grant no such remedy, and the owner of a valid oil and gas mining lease on lands in such State may maintain an action to enjoin those claiming the right and about to operate for and produce and sell the oil and gas therefrom under a later and similar lease from the same lessors, and in such action the court will determine the rights

of the two lease claimants; and if the title of the plaintiff be found valid, plaintiff will be entitled to injunction, discovery and accounting.

In the light of the foregoing points discussed in this argument, if the points be well taken and successfully maintained, the proposition seems to follow that having the license, exclusive privilege or right, an incorporeal hereditament, under the instrument called an oil and gas mining lease, and no adequate remedy at law for a violation of such right, the plaintiff is entitled to an injunction to prevent interference with him in the exercise thereof.

The Supreme Court of Oklahoma has in no cases yet brought before it directly determined that the proper remedy of a party claiming under a subsequent lease made by the same lessors is by injunction to prevent the second lessee from interfering with the exclusive rights of the first lessee to prospect for and produce the oil and gas under its contract therefor. However, in the case of *Kolachny* v. *Galbreath*, 26 Okla. 722, such a situation presented itself, and the action was by petition in the nature of a bill in equity for injunction, and while the court decided the case adversely to the first lessee, no objections appear to have been made to the form or nature of the action brought; and by inference, at least, it seems to have been conceded that the nature of the proceeding was proper, and the court seems to recognize as proper the remedy sought to be applied,

and but for certain infirmities in the contract, the relief prayed for would have been granted.

That, as we have hereinbefore shown, the same case held that ejectment did not lie, and also held, as we have hereinbefore shown, that the estate created by such a lease in the lessee out of possession is not such an estate in lands as that any remedy at law can be applied to relieve against trespass on such lessee's rights, under the laws of the State of Oklahoma. Hence it follows that unless it be conceded that the right, interest, or privilege granted to the lessee upon a valuable consideration is right that cannot be in any manner enforced in the courts of Oklahoma, such courts, when such a situation is presented, must of necessity grant equitable relief; and injunction, discovery and accounting are the most appropriate, equitable remedies.

While the Supreme Court of Oklahoma has not decisively fixed a bill in equity for injunction, discovery and accounting, as the appropriate remedy in such cases, all other courts where an action of ejectment is denied, in the case of oil and gas leases, have held such a bill to be proper and the courts of equity open to such a lessee for the protection and enforcement of his rights, and this they have held from the necessity of the case and upon principle and maxim that equity will not suffer a wrong to be without a remedy.

Brown v. *Spilman*, 155 U. S. 655;
550;

Coosaw Mining Co. v. *South Carolina*, 144 U. S. 550;
Erhardt v. *Boaro*, 113 U. S. 527;
Franklin Tel. Co. v. *Harrison*, 145 U. S. 459;
Joy v. *St. Louis*, 138 U. S. 1;
Allegheny Oil Co. v. *Snyder*, 106 Fed. 764;
Friend v. *Mallory*, 52 W. Va. 53.

This principle was recently recognized and applied by this court in the case of *Guffey* v. *Smith*, 237 U. S. 101-113, decided at the October term, 1914, in which case an action had been brought for injunction, discovery and accounting, as in the case at bar, on behalf of the holder of a prior lease, out of possession, against a subsequent lessee of the same lands, who was attempting to remove the oil and gas thereunder; and after a careful consideration of the case and the fact that under the laws of the State of Illinois, where such lease had been made, a remedy at law in the nature of ejectment was denied, the court held the remedy of injunction, discovery and accounting appropriate and speaking by Mr. Justice Van Devanter, say in part:

> "It is also settled that in the courts of Illinois the holder of such a lease cannot maintain an action of ejectment thereon (citing cases), and by reason of the legislation of Congress requiring that in actions at law in the Federal courts of first instance effect shall be given to the local laws and modes of proceeding (Rev. Stat., Secs. 721, 914, Comp. Stat. 1913, Secs. 1538, 1537) it results that the complainants could not have maintained an action of ejectment in the circuit court. An action for dam-

> ages, of course, would not have afforded a plain, adequate and complete remedy in the circumstances, and if such a remedy was to be had, it was necessary to resort to a suit in equity for an injunction, discovery, and accounting, as was done."

That case would seem to be decisive of this point, the Supreme Court of Oklahoma having held an oil and gas mining lease of the character in controversy in this case invested the lessee with the exclusive right or privilege to prospect the lands covered thereby for oil and gas, an incorporeal hereditament and chattel real; and even had such court also determined that no remedy whatever would be given by the courts of the State of Oklahoma for the enforcement of such right, the courts of the United States would in no sense be bound by such a determination, and would give effect to the rights of the party, according to the maxims and principles of equity. An example of this doctrine applied by this court is found in *Guffey* v. *Smith, supra,* it having been in that case determined, in accord with the uniform doctrine of this court, that

> "Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what its principles are, and to apply such of them to each particular case as they may find justly applicable."

The decision of this court, and the application

of the remedy of injunction and the virtual determination of the rights of the several claimants, in that case is supported, if support be required, by precedents in the highest courts of other States where the remedy of ejectment, in such cases, is denied.

Thus in *Bettman* v. *Harness*, 42 W. Va. 433, after an elaborate discussion of the question, that court not only held injunction a proper remedy, but further decided that having jurisdiction to prevent the irreparable injury occasioned by such acts, they would go further and determine the rights of the parties under the different leases. The opinion in the case discloses a careful consideration of the principles involved and, as in *Smith* v. *Guffey, supra*, a clear understanding of the nature and character of the oil industry. The same is true of the decision of the Supreme Court of Illinois in *Gillespie* v. *Fulton*, 236 Ill. 188, where the same conclusion was declared.

V.

In an action for injunction and accounting, brought by the owners of an oil and gas mining lease while out of possession of the leased premises, and against the lessors and lessees of a subsequent lease where the lessees of the second lease have entred thereunder and are about to mine and remove the oil and gas underlying the lands, under the second lease, the allegations of the bill as to the character and derivation of the

title of the plaintiff and the character and derivation of the claim and title asserted by the defendant, in connection with the nature of the acts done thereunder, are usual, proper and essential in such a bill.

The judicial determinations as to what constitute the appropriate allegations of a bill for injunction, discovery and accounting, in a case like that at bar, are not numerous; or conversely, the decisions as to what are inappropriate allegations are even less numerous, hence resort must be had to the general line of authorities in analogous proceedings, and the scope of not only the bills in the various cases, but the evidence considered by the courts in their decisions.

In the case of *Douglas* v. *Nuzum*, 16 Kan. 515, the action was to quiet title and the court held that the petition in such case should show the nature of the defendant's claim, if known, and if unknown, should aver ignorance thereof and pray a discovery. The opinion in that case was written by BREWER, Judge, lately a Justice of this court. It would appear that no good reason could be urged against a statement in the bill of the character of the claim under which the defendants were attempting to remove the oil and gas. It is a well settled principle that a mere statement in a bill for injunction, that irreparable injury will result unless the defendant be restrained, is insufficient in the absence of facts from which such ir-

reparable injury will of necessity flow. *Chicago City Railway Company* v. *General Electric Company,* 74 Ill. App. 465. The allegations of the bill in this case touching the nature of the defendants' claim and the fact that other of the defendants were the lessors in both leases and that the execution of such second lease had cast a cloud upon the title of the plaintiffs and that such defendants were to that extent interfering with the exercise by the plaintiffs of their rights under the first lease, would seem to render the allegations in relation to the execution of the second lease by some of the defendants to the defendant Kathleen Oil Company, and the entry thereunder by the defendant oil company for the purpose of removing the oil and gas for and during a term of years, necessary and appropriate both as disclosing the inequitable conduct of the defendant lessors, and the continuing character of the trespass being and about to be committed by the defendant oil company, and thus by facts, and not a mere inference disclose the irreparable nature of the injury that would be inflicted by the defendants if permitted to carry out their iniquitous agreement.

In the case of *Miller* v. *Burket,* 132 Ind. 469, it was sought to enjoin a trespass on lands and it was said by the court:

> "It is not averred that the appellant asserted any interest in the land other than the right to break the close and enter upon it and it is apparent that the right thus asserted was only for

the purpose of cutting and removing the wheat."

It would seem in a case of trespass in general where an injunction was asked and this is a general law, that the character of the claim made by the trespasser is particularly important in order to make a case of continuing trespass disclosing irreparable injury such as would be irremediable except in equity.

In the case of *McKinzie* v. *Matthews*, 59 Mo. 99, an injunction was sought to prevent the threatened cutting of timber, and the court held that the petition should show whether defendant is in possession, and what title, if any, he claims, in order that the court may be able to judge whether the plaintiff will be injured by his acts.

In *Hungerford* v. *Cushing*, 8 Wis. 332, it was said that the pleader may state the defendant's interest so far as he knows it, and allege that he does not know the definite interests of the others.

In *Blakeslee* v. *Missouri Pacific Railway Company*, 43 Nebr. 361, it was held that the allegations as to the title claimed by the defendants are necessary and proper for the purpose of showing the continuing character of the trespass and the intention of the defendants to contiue their acts of trespass, and that a mere inference of the intention to continue the trespass, such as might have been drawn from

the bill, was not sufficient without the facts upon which based.

In the case of *Coffeyville Mining and Gas Company* v. *Citizens Natural Gas and Mining Company*, 55 Kan. 173, where the action was by the owner of a franchise to furnish the City of Coffeyville with gas, this fact was alleged and it was also alleged that a second franchise had been granted to the defendants and that thereunder the defendants were about to interfere with the rights of the plaintiff. This appears to have been considered by the court a proper allegation.

In the case of *Mendelssohn* v. *McCabe*, 144 Cal. 230, the cross petition was to enjoin the plaintiffs from using a right-of-way, unless they closed the gates, which the easement provided the defendant might maintain. The court sustained their contention and said:

> "It was necessary to show an intention on the part of the plaintiff to continue the injurious acts, and a reasonable ground to apprehend that he would do so, in order to establish the right to an injunction."

The same might be said of the allegations of claim of title under a lease for a term of years and the derivation thereof in the defendant oil company, alleged in the bill in this case.

The Supreme Court of Georgia, in the case of *Ryan* v. *Fulghum*, 96 Ga. 234, where the petition al-

leged that the defendant was claiming title to land and that such title was fraudulent, and was about to enter thereupon, dismissed the petition, saying:

> "It is true that there was in general terms an allegation that the defendant was claiming the property under some pretended title and a prayer that the title be delivered up for cancellation. There was no identification of the particular paper or papers sought to be cancelled nor a suggestion as to how or where the deed or deeds were fraudulent."

It was also held in *Cooke* v. *Central District and Printing Telegraph Company,* 21 Pa. Super. Ct. 43, that a petition to restrain the erection of a telegraph pole on the property of the plaintiff, without alleging the want of authority to erect the pole or that such erection was unlawful, did not state a cause of action.

As to allegations of claim and interest of defendants in bills in equity in general. We quote the following from Story's Ep. Pl. p. 505:

> "It is not sufficient to show the title and interest of the plaintiff in the subject matter of the suit; but there must be such averments as show that the defendant also has an interest in the subject matter, and is liable to answer him therefor."

In *Stillwell* v. *Adams,* 29 Ark. 346, the action was to foreclose a mortgage. The court said:

> "It is not sufficient for the complainants to show their own right of action; they must with

apt averments show the liability of the defendant to them."

It was said by this court, in *Ringo* v. *Binns,* 10 Peters 269, that no case exists for the interference of a court of equity against tenants of land, unless there be a charge that the tenants obtain and retain possession in contravention of some equity subsisting between them and the complainants. In fact, it appears to be a comparatively uniform practice in actions in equity to enjoin violation of an exclusive right or privilege to allege not only the claim and title of the plaintiff, but likewise the claim and title asserted by the defendant, if known, it being the province of the court to adjust the equities between the parties and to give effect to superior equities; and in *McClanahan, Adm'r* v. *Davis,* 8 How. 170, 182, the bill was citicized because it failed to show by averments the interest of the defendants in the subject matter, other than a general allegation of reputed possession.

In the case of *Shulthis* v. *McDougal,* 225 U. S. 561, which was for injunction on behalf of the claimant under one oil and gas mining lease against the claimant under another oil and gas mining lease, there was an allegation in the bill of the claim of title of the plaintiff, and an assertion that the defendants claimed an interest in the oil and gas acquired subsequent to the claim and title of the plaintiff, and the appeal from the circuit court in that case was

dismissed for the reason that from the allegations of the bill it did not appear that it involved a controversy arising under the laws of the United States. While in the case of *Wilson Cypress Company* v. *Del Pozo y Marcos*, 236 U. S. 635, the court sustained the jurisdiction of the court on a petition which did allege both the claim and derivation of the title of the plaintiffs and the defendant.

In *Guffey* v. *Smith*, 237 U. S. 101, the claim and right of the second leases were considered as an essential ingredient in rendering equitable relief by injunction. The same is true of the consideration of the facts in *Joy* v. *St. Louis*, 138 U. S. 1; and *Franklin Telegraph Co.* v. *Harrison*, 145 U. S. 459. Not only legal rights and remedies are considered in the courts of equity, but the equitable rights of the parties grow out of the whole situation. Further than this, should the lease of the plaintiffs be upheld in this case, they are entitled to injunction against the defendants operating or asserting rights under their void lease. And the fact that part of the defendants entered into a second lease with the other defendant, both having knowledge of the prior lease, could scarcely be said to be an inappropriate allegation in a bill demanding equitable relief against their acts thereunder.

We have found no authority condemning the practice of stating in a bill in equity the nature of the claim to the subject matter made by the defendants, and the manner in which it is being asserted; and in

the light of both reason and precedent, consider the allegations of the bill in relation thereto proper in good pleading.

VI.

In an action by the lessee under an oil and gas lease covering Oklahoma lands, for injunction, discovery and accounting, brought against a second lessee of the same lands, the plaintiff, by pleading the character and derivation of his title under an act of Congress and the character and derivation of the claim and title asserted by the defendant, and the facts in relation thereto, and it being alleged that a decision of the controversy between the parties depends upon the construction of certain specific acts of Congress of the United States, or parts thereof applicable to the case, and that certain provisions of the acts of Congress upon which the adverse claim and title rest were violative of provisions of the Constitution of the United States specified in the bill, there is represented by appropriate allegations a controversy arising under the Constitution and laws of the United States, within the purview of 36 Stat. at L. 1091, of which the District Court of the United States has jurisdiction.

If it be determined that the allegations with reference to the title of the plaintiff and defendant were appropriate allegations, as we urge they were, the

jurisdiction of the District Court must, we think, be sustained.

Little York etc. Water Co. 1. Keyes, 6 Otto. 199;
Osborn v. *Bank,* 9 Wheat. 824;
Starin v. *New York City,* 115 U. S. 257;
Tennessee v. *Davis,* 10 Otto. 135.

This court in the case of *Wilson Cypress Company* v. *Del Pozo y Marcos,* 236 U. S. 635, expressly held the allegations that the controversy between the parties required the construction of certain Acts of Congress specified in the bill, and that a correct decision of the controversy depended upon such construction and the validity of the acts, appropriate allegations and necessary in order to disclose jurisdiction.

Thus, in the case of *Shulthis* v. *McDougal, supra,* the bill was dismissed because of failure on the part of the plaintiff to allege in his bill that the rights and title of the plaintiff and the controversy between the plaintiff and defendant depended upon the construction of specified Acts of Congress. The court say:

> "To sustain the contention that the suit was one arising under the laws of the United States, counsel for the appellants point out the statutes (citing) relating to the allotment in severalty of the lands of the Creek Nation, the leasing and alienation thereof after allotment, the making of allotments to the heirs of deceased children, and

the rights of the heirs, collectively and severally, under such allotments; but the bill makes no mention of those statutes or of any controversy respecting their validity, construction, or effect. Neither does it by necessary implication point to such a controversy. True, it contains enough to indicate that those statutes constitute the source of the complainant's title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and uncertain. Of course, it could have arisen in different ways, wholly independent of the source from which his title or right was derived. So, looking only to the bill, as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned."

While in the Wilson Cypress Company case, the court expressly sustained the jurisdiction, where the bill alleged, as in the case at bar, the derivation and claim of title of both the plaintiff and defendant under the laws of the United States, and in substance that the correct determination of the controversy depended upon the construction of certain specified laws.

From the two cases last cited in our view, there can be no doubt that the bill, by proper allegations, discloses a controversy arising under the Constitution and laws of the United States, within the meaning of 36 Stat. L. 1091, as early interpreted by this court in the case of *Cohens* v. *Virginia*,

6 Wheat. 264, 379, where Mr. Justice MARSHALL, speaking for the court, said:

> "If it be to maintain that a case arising under the Constitution or a law, must be one in which the party comes into court to demand something conferred on him by the Constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."

This is reiterated in the case of *Bankers Mutual etc. Company* v. *Minneapolis, St. Paul etc Railway Company,* 192 U. S. 371, where it is said to be settled that a suit arises under the constitution and laws when it really and substantially involves a dispute and controversy as to the effect or construction of the constitution or some law or treaty of the United States, upon the determination of which the result depends and which appears on the record by plaintiff's statement of his case, in logical form, such as is required in good pleading.

We are not oblivious to the line of authorities presented in the trial court and which no doubt will be urged here, of which *Taylor* v. *Anderson,* 234 U. S. 74, is a late example, holding that allegations in a petition in *ejectment* as to the character of the defendant's title and that it was void under certain

Congressional legislation, does not present a case arising under the laws of the United States for the reason that in the action of ejectment it has always and ever been unnecessary to allege the character of the defendant's title, and that the plaintiff must recover on the strength of his own title, but we feel that those cases are readily distinguishable from the difference in the character of the actions and the rules of pleading applicable. Our view finds support in the opinion in *Taylor* v. *Anderson, supra,* where Mr. Justice VAN DEVANTER, who expressed the opinion of the court in that case, observed in the course thereof that

> "However essential or appropriate these allegations might have been in a bill in equity to cancel or annul the deed, they were never essential or appropriate in a petition in ejectment."

In the light of all the authorities, we believe the allegations of the bill with reference to the character of the title of both the plaintiff and the defendant, and that a correct determination of the controversy between them depended upon a construction and the validity of certain specified Acts of Congress proper allegations and that the bill, presented a case within the jurisdiction of the District Court, and for that reason this court will reverse and remand the case to the District Court for trial.

WILLIAM F. TUCKER,
HULETTE F. ABY,
Attorneys for Plaintiffs.

In the

Supreme Court of the United States.

October Term, 1916.

OSCAR M. LANCASTER and PATRICK M. KERR,
Appellants,

vs.

KATHLEEN OIL COMPANY, JULIAN BROWN, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF of APPELLEES.

GEO. S. RAMSEY,
EDWARD H. CHANDLER,
EDGAR A. de BEULES,
MALCOLM E. ROSSER,
SOL H. KAUFFMAN,
Counsel for Appellees.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 795.

OSCAR M. LANCASTER and PATRICK M. KERR,
Appellants,

vs.

KATHLEEN OIL COMPANY, JOSIAH BROWN,
et al.,* - - - - - - - - - - - - - - *Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF *of* APPELLEES.

May It Please the Court:

This case comes to this court on the question of jurisdiction, the bill having been dismissed by the District Court for the Eastern District of Oklahoma because it failed to show the existence of a Federal question. There is no diversity of citizenship, the parties all being residents of Oklahoma.

The plaintiffs (as the appellants are herein designated), claiming under an oil and gas mining lease from certain of the defendants, allege that the Kathleen Oil Company, one of the defendants, is and for some time past has been in possession of the land covered by the lease and continuously operating for and removing oil and gas from the lands, and plaintiffs seek to enjoin and restrain the Kathleen Oil Company from committing such acts and from interfering with the plaintiffs and preventing them from the exercise of their rights as oil and gas mining lessees under their lease.

Condensed, the bill sets forth:

1. The parties are citizens of Oklahoma.

2. The matter in controversy exceeds in value Three Thousand Dollars ($3,000.00), "and arises under the Constitution and Laws of the United States, and the right, title, interest and cause of action of the plaintiffs depends upon one construction of section 9, of the Act of Congress, approved May 27th, 1908, entitled 'an act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes' (35 Stat. L. 312), and the constitutionality of the said section of the said act."

3. The land, which is described, was allotted to Lizzie Brown, a citizen of the Creek Tribe of Indians, of three-quarter blood, as her homestead allotment, she receiving a patent therefor on March 27, 1903.

4. Lizzie Brown died leaving surviving her her husband, Josiah Brown, and certain children, all of whom are made defendants.

5. These children being minors, Josiah Brown was appointed their guardian March 22nd, 1912.

6. Josiah Brown and these minor children were, and are, the owners in fee simple of the lands in question and on April 4th, 1912, made an oil and gas mining lease to plaintiffs.

7. This lease was duly recorded.

8. Plaintiffs claim the exclusive right to operate for and produce oil and gas on the land.

9. On June 2, 1912, Josiah Brown, for himself and as guardian of the children, made an oil and gas mining lease covering the same land, to the Kathleen Oil Company, which was approved by the Secretary of the Interior.

10. This lease was duly recorded.

11. The Kathleen Oil Company entered into possession with full knowledge of plaintiffs' lease, and claims the exclusive right to produce oil, etc., which claims are without right.

12. The plaintiffs entered on the land and prepared to drill, but before drilling learned of the Kathleen Company's lease and ceased or "postponed" operations, pending effort "to remove the cloud." Application was made to the Secretary of the Interior to cancel the Kathleen Company's lease, but it was denied.

13. The Kathleen Company is operating for and producing oil and gas on the land, and is about to remove and sell the same and is preventing the plaintiffs from operating for and producing oil and gas thereon, such acts constituting a "continuous trespass."

14. Plaintiffs are willing to perform all conditions required of them under their lease.

15. They waive any right to surrender the lease and offer to do equity.

16. "That plaintiffs made their agreement of lease hereinbefore mentioned, upon a construction of the Constitution and Laws of the United States, that the said land descended to the heirs of the said Lizzie Brown, deceased, above named, free from

any restrictions against the leasing thereof for oil and gas mining purposes; and the validity of the lease of the plaintiffs aforesaid, and their right to develop and operate thereon for oil and gas depends upon the question whether the oil and gas mining lease agreement made as aforesaid and without the approval of the Secretary of the Interior of the United States, is a valid contract, and necessarily involves a construction of the Act of Congress of May 27th, 1908, entitled 'an act for the removal of restrictions from part of the lands of the allottees of the Five Civilized Tribes,' and for other purposes (35 Stat. L. 312), and particularly of section 9 of said act, and presents a federal question for the determination of this court."

17. The Act of May 27th, 1908, is unconstitutional in restricting the transmission of the lands of Lizzie Brown to her heirs so that their capacity to lease the lands is restricted, after her death, without the approval of the Secretary of the Interior; and if the proviso of section 9 of this act be construed to impose such restrictions, it is unconstitutional.

18. The plaintiffs excuse their delay in bringing suit.

The relief prayed for is an injunction and an accounting for oil and gas removed from the lands.

This case is governed by the case of *Taylor* v. *Anderson*, 234 U. S. 74.

In its essence, this is a bill to recover possession of land. It alleges that the plaintiffs are the holders of an oil and gas mining lease from the fee simple owners of the land, giving the plaintiffs the exclusive right of possession for oil and gas mining purposes; that they are deprived of such possession by the Kathleen Oil Company, which is in possession and is itself boring for and producing oil and gas on the land. This suit is, therefore, in its nature, simply an equitable action of ejectment; a substitute for ejectment, brought in equity because, for technical reasons, ejectment will not lie at the suit of the lessee to recover possession under an oil and gas lease, on the ground (whether sound or not) that the right of a lessee under such lease is an incorporeal hereditament and such a right cannot be enforced by ejectment. In other words, an officer charged with a writ of possession is supposed to be unable to put the lessee in possession on account of the incorporeal nature of the right or estate.

—*Kolachny* v. *Galbraith*, 26 Okla. 772, 110 Pac. 902.

This suit, therefore, differs from the legal action of ejectment *only in the nature of the relief required.*

The relief required is to enjoin the alleged trespasser and prevent it from interfering with the lessees in the prosecution of their rights under the lease. Nothing more is required, therefore, than the mere statement of plaintiffs' right and title, the facts constituting the invasion of such right, and the nature and extent of the injury suffered, so as to indicate the nature of the relief required. It is not necessary to state that the right was acquired in view of a certain interpretation or construction of some statute (which might or might not govern), and say in effect that if such construction be sustained the right is enforceable and, if it be rejected, it is unenforceable; because such statements are mere argument and have no proper place in the bill.

—*Shulthis* v. *McDougal*, 225 U. S. 561;
Fletcher's Eq. Pl., 136.

The mere fact that the plaintiffs question their own title will not confer jurisdiction in equity, much less raise a federal question. The plaintiff, in equity cases as in other cases, if he seeks to recover possession, upon a legal right, must rely upon the strength of his own title.

—*Hough* v. *Martin*, 2 Dev. & B. Eq. (N. C.) 379, 34 Am. Dec. 403.

There is no jurisdiction in equity merely on account of the doubtful state of a legal title; other grounds of equitable jurisdiction must be shown.

—*Jones* v. *Jones,* 3 Meri. 161, 36 Eng. Repr. 62;

Hipp v. *Jolly,* 19 How. 271, 15 L. ed. 633.

Lord COTTENHAM said in *Bacon* v. *Jones,* 4 Mylne & C. 433:

"The jurisdiction of this court is founded upon legal right; the plaintiff coming into court on the assumption that he has a legal right and the court granting its assistance on that ground."

"It is, in general, necessary to aver title; and when the plaintiff's right appears doubtful the court always refuses to interfere. Eden on Injunctions, 380."

—*Laughlin* v. *Lamasco,* 6 Ind. 223.

"With respect to the manner in which the plaintiff's case should be presented to the court, it is to be observed, that whatever is essential to his rights and is necessarily within his knowledge ought to be alleged positively as a fact."

—Daniell's Chancery, 6th American Ed. 361.

"The rule that pleadings must show title is not confined to pleadings at law, or under

codes and practice acts, but is equally stringent where the proceeding is in equity."

—21 Encyc. Pl. & Pr. 713.

"A bill must show title in the complainant in the subject matter, or such a claim as gives the complainant the right to have the injury to the subject matter or wrong with relation to it corrected."

—Van Zile, Eq. Pl. 29.

The ground for relief in equity in a case of this kind cannot be the doubtful nature of the right or title of the plaintiff, but the continuing or irreparable nature of the injury coupled with the fact that the right is of such a character (incorporeal hereditament) that it cannot be recovered in a law action. If it were not for these latter two incidents, plaintiffs would have no standing in equity at all. In these two particulars only, and in the nature of the relief required, does the present suit differ from an action at law for the recovery of possession of property.

While, of course, the title or ownership in the plaintiffs must be positively alleged, it is not necessary to set it up with all the wealth of detail plaintiffs employ in the bill.

By Rule 25 of the New Equity Rules distinctions between rules of pleading in equity cases and in law

cases have been virtually abolished; and if the charging part of a bill in equity were ever essential, it is now entirely dispensed with. All that is now required is "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

In actions to recover possession of real property it has long been the rule that the only ultimate facts required to be stated are: *(1)* the description of the lands; *(2)* the extent or nature of the interest asserted, and *(3)* that the defendant is withholding possession.

—*Payne* v. *Treadwell,* 16 Cal. 242;

Christy v. *Scott,* 14 How. 268, 14 L. ed. 422;

Johnson v. *Vance,* 86 Cal. 128, 24 Pac. 863;

Austin v. *Schluyer,* 7 Hun. (N. Y.) 275;

Hihn v. *Mangenberg,* 89 Cal. 268, 26 Pac. 968;

Walter v. *Lockwood,* 23 Barb. (N. Y.) 228, 4 Abb. Pr. 309;

People v. *New York,* 28 Barb. (N. Y.) 240;

Sanders v. *Leavy,* 16 How. Pr. (N. Y.) 308;

Ensign v. *Sherman,* 14 How. Pr. (N. Y.) 439;

Coryell v. *Cain,* 16 Cal. 567;

Garrison v. *Sample,* 15 Cal. 93.

In *Payne* v. *Treadwell*, 16 Cal. 242, Mr. Chief Justice FIELD (subsequently a justice of this court) speaking for the court said:

> "The complaint must contain 'a statement of the facts constituting the cause of action in ordinary and concise language,' and it may be verified by the oath of the party, in which case the answer must also be verified. The system in this state requires the facts to be alleged as they exist, and repudiates all fictions. And only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is in itself indifferent. Now, what facts must be proved to recover in ejectment? These only: *that the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years*, and that the defendant was in their possession at the commencement of the action. The seizin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyance from a paramount source of title, or by evidence of prior possession. It is the ultimate fact upon which the claim to recover depends, and it is facts of this character which must be alleged, and not the prior or probative facts which go to establish them. It is the ultimate facts—which could not be struck out of a pleading without leaving it insufficient—and not the evidence of these facts, which must be stated. It is sufficient, therefore, in a complaint in ejectment for the plaintiff to aver in respect to his

title, that he is seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact. The right to the possession follows as a conclusion of law from the seizin, and need not be alleged."

An allegation that the plaintiff is the owner of certain real or personal property is a statement of an ultimate fact and sufficient to aver title.

—*Payne* v. *Treadwell,* 16 Cal. 242;
Garwood v. *Hastings,* 38 Cal. 216 (using the word "owner");
Gage v. *Kauffman,* 133 U. S. 471, 33 L. ed. 725;
Ely v. *R. Co.,* 129 U. S. 291, 32 L. ed. 688;
Johnson v. *Vance,* 86 Cal. 129, 24 Pac. 863.

The rule in equity is the same:

—*Wiggin* v. *New York,* 9 Paige (N. Y.) 16;
Laughlin v. *Lamasco,* 6 Ind. 223;
Daniell's Chancery, (6th Am. Ed.) 362, 1896.

In a suit for injunction to restrain an injury to land it is not necessary that the petition should aver from whom or how the title was obtained. This is a matter of evidence.

—*Planet Co.* v. *St. Louis R. Co.,* 115 Mo. 613, 22 S. W. 616.

If plaintiffs claim the exclusive right to dig for oil and gas they need only recite that they are the lessees of a certain oil and gas lease, executed to them by the owners of the fee, and then set forth the lease or its legal effect. They need not recite any presumed defect in their title and negative it but that is properly for the defendants if the latter so desire.

—*Payne* v. *Treadwell*, 16 Cal. 242;
Gage v. *Kauffman*, 133 U. S. 471, 33 L. ed. 725;
Christy v. *Scott*, 14 How. (U. S.) 282, 14 L. ed. 422.

The reason, according to Serjeant Stephens, is that if it were requisite to show from whom the party derived his title, it might be required on the same principle to show from whom that person derived his, and so *ad infinitum*.

—And. Steph. Pl., Sec. 175.

But the better reason is that a simple allegation of ownership is the statement of an ultimate fact, and the derivation of the title, if material, is a matter of evidence.

—*Payne* v. *Treadwell*, 16 Cal. 242.

It was certainly unnecessary to set forth the blood, nationality, ancestry and other personal at-

tributes of the lessors, who are the fee owners, as these facts, if material in any event, only go to their capacity to convey, which is a matter of defense. Capacity to convey will be presumed, and if any attack is to be made thereon, it is for the defendants to make it. Nor was it necessary to set up the source of title in the fee owners.

The rule that a plaintiff cannot create a federal question by anticipating the defense which may or may not be made to the right or title claimed, is so well established that it hardly needs a citation of cases.

The whole premises can be summed up in a slight paraphrase of *Taylor* v. *Anderson*, 234 U. S. 74:

> "The judgment here under review is one of dismissal for want of jurisdiction. The action was an equitable substitute for ejectment. The petition alleged that the plaintiffs were the lessees in an oil and gas mining lease from the owners in fee and entitled to possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged in a manner requiring relief in equity. Nothing more was required to state a good cause of action. * * * But the petition, going beyond what was required, alleged with much detail that one of the defendants was claiming under a subsequent oil and gas lease from the fee owners;

that such defendant's lease had been approved by the Secretary of the Interior, and that plaintiffs' lease had not been so approved, but that plaintiffs had interpreted or construed the law not to require such approval, and if the law did require it, then the law is unconstitutional. However essential or appropriate these allegations might have been in a bill in equity to cancel or annul the lease, they were neither essential nor appropriate in a bill to restrain the defendants from interfering with the plaintiffs in operating under their lease and excluding them from the land—in effect, a bill to recover possession of the land. Apparently, their purpose was to anticipate and avoid a defense which it was supposed the defendants would interpose, but, of course, it rested with the defendants to select their ground of defense, and it might well be that this one would not be interposed. In the orderly course, the plaintiffs were required to state their own case in the first instance and then to deal with the defendants' after it should be disclosed in the answer. Snyder's Comp. Laws, Secs. 5634, 5642, 5668; *Boston etc. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 639. Diversity of citizenship was not alleged, and, unless the allegations respecting the invalidity, under the legislation of Congress, of the defensive claim attributed to the defendants operated to bring the case within the jurisdiction of the District Court, the judgment of dismissal was plainly right.

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"It is now contended that these allegations showed that the case was one arising under the laws and constitution of the United States, and therefore brought it within the District Court's jurisdiction. But the contention overlooks repeated decisions of this court by which it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute (now Sec. 24, Judicial Code), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose. *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, 460; *Third Street Railway Co.* v. *Lewis*, 173 U. S. 457, 460; *Florida Central Railroad Co.* v. *Bell*, 176 U. S. 321, 329; *Boston etc. Mining Co.* v. *Montana Ore Co., supra; Joy* v. *St. Louis, supra; Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Louisville & National Railroad Co.* v. *Mottley*, 211 U. S. 149; *Shulthis* v. *McDougal*, 225 U. S. 569; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133-135. Tested by this standard, as it must be, the case disclosed by the petition was not one arising under a law of the United States."

This Is Not a Suit to Remove a Cloud.

Counsel for appellants refer to cases to cancel conveyances on the ground that they are void and constitute a cloud upon the title, in which defendant's claim of title is permitted to be set up in the bill—in fact, should be. A little thought will demonstrate why this is so. If one sues to cancel a conveyance or other claim constituting a cloud upon the title, naturally one must describe that claim as best he can, and state why it is a cloud.

But suits to remove clouds are brought by persons in possession.

—*Boston &c Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 47 L. ed. 626;

Orton v. *Smith*, 18 How. 263, 15 L. ed. 393;

Whitehead v. *Shattuck*, 138 U. S. 146, 34 L. ed. 873;

Sharon v. *Tucker*, 144 U. S. 533, 36 L. ed. 532.

Therefore, to maintain such a suit the plaintiff must first sue to recover possession.

This kind of a suit, it might be said, is *sui generis*. It is not an action at law to recover possession, because of the nature of the subject-matter, being an incorporeal hereditament. It is not the ordinary

suit for trespass because in such suits usually the plaintiff is in possession of the lands. It is not a suit to restrain waste because the defendants are not tenants under the plaintiffs. But the present bill is more nearly analogous to an action of ejectment at law to recover possession than any other kind of proceeding. So far as purely equitable proceedings are concerned, it is more nearly analogous to an injunction to restrain a trespass where plaintiff is in possession; and although in this case the defendant, Kathleen Oil Company, is in possession, it is amply sufficient to allege that the defendant is in possession without right and is taking oil and gas therefrom and excluding the plaintiffs from the exercise of their rights as lessees, and threatening to continue doing so. Allegations in actions of ejectment that the defendant is unlawfully withholding possession from the plaintiff are universally treated in modern practice as sufficient and why not so in this case? The principles are the same.

—*Payne* v. *Treadwell*, 16 Cal. 242.

Appellants' counsel seem to argue that the continuing nature of the trespass must be shown by a lease or by some definite claim or right on the part of the defendants. But why? Could not the trespass be of a continuing nature without any claim or right

whatever by the defendants? Such an invasion of right would be all the more enjoinable.

—*Wheeler* v. *Noonan,* 108 N. Y. 179, 15 N. E. 67;

Griffith v. *Hilliard,* 64 Vt. 643, 25 Atl. 643;

Slater v. *Gunn,* 172 Mass. 509, 49 N. E. 1016 (see form of bill in 9 Encyc. Forms, 868).

In *Indianapolis Gas Co.* v. *Kibby,* 135 Ind. 357, 35 N. E. 392, the court said:

"The complaint shows the appellant to be simply a stranger who has entered upon said land, and 'engaged in the erection of a derrick thereon, and threatens and intends, without the consent of the plaintiff, and unlawfully, to bore a well on said land for gas, and threatens to convey from said premises the gas flowing from such well by pipes.' And, further, 'that if said defendant is permitted to do this, that it will greatly lessen the flow of natural gas from any well that said plaintiff may cause to be bored on said land, whereby irreparable damage will be caused,' etc. We think that an injunction was the proper remedy. An action for damages would have been inadequate, since the damages could not be measured. By the terms of the contract, appellee had a right to all the gas under the 80-acre tract that could be obtained by boring within the 20-foot square, save that which might be obtained from one well for the domes-

tic use of the owner and his neighbors. From the nature of the product, it is evident that one flowing well would withdraw the gas from a considerable territory, and that other wells could not be sunk within such territory without diminishing the flow to the first well. How much the flow of appellee's well would be diminished, however, could not be determined; the damages could not be measured in money. Neither would ejectment lie as to that part of the 80-acre tract outside the bounds of the 20-foot square, for as to that part of the land appellee has only the right to the gas under the surface which may be drawn to the wells sunk within the square. *Funk* v. *Haldeman,* 53 Pa. St. 229; *Allison's Appeal,* 77 Pa. St. 221; 1 High Inj., Sec. 697. Whatever might be the rights of the grantors in the contract set out in the complaint, it is clear that appellant had no right to do the acts complained of, and that the appellee was entitled to the injunction granted."

Certainly a land owner is not required to suffer a continuing trespass because the trespasser has no claim or shadow of right. If it were simply a temporary or fugitive trespass, the case might be different; but where the trespasser has taken and is in full possession and committing a continuous trespass, depleting the estate, any reasonable person would have the right to presume that the defendant would continue the trespass until restrained. The facts set up in paragraph thirteen of the plaintiffs'

bill are amply sufficient to show such a character of injury as to entitle them to relief in equity.

We set forth fully paragraph thirteen of plaintiffs' bill. This has the usual form of allegations in this kind of suit to show that the injuries are of such a character as to entitle plaintiffs to relief in equity, and we see no reason why anything more was required. It is certainly amply strong:

> "That the defendant, Kathleen Oil Company, notwithstanding the said Kathleen Oil Company and its principal officers at the time had full knowledge of the lease contract of plaintiffs and the rights, interest and claim of the plaintiffs under their said lease contract, and that the plaintiffs had and claimed thereunder the exclusive right to develop and mine oil and gas thereon, has entered upon and taken possession of the said premises hereinbefore described, has prevented and still prevents plaintiffs obtaining possession thereof for the purpose of drilling or boring thereupon for oil and gas, and has bored and drilled wells thereon, producing natural gas in large quantities, and is drilling, or about to drill other wells for mineral oil and natural gas thereupon with the purpose and intention of removing and selling such oil and gas, and has removed and sold, and is about to remove and sell oil and gas from said premises of the value of many thousands of dollars, the exact amount of which is unknown to plaintiffs, all in violation of the exclusive rights and interest

of the plaintiffs under their said lease contract; and the said defendant, Kathleen Oil Company, is continuing to bore and drill wells thereon for the purpose of producing more oil and gas and of removing and selling the same, and will exhaust the deposit of said oil and gas mineral deposits under the said lands unless restrained and enjoined by this Honorable Court, to the irreparable loss and damage of the plaintiffs. That the continuous mining, production and sale by said defendant, Kathleen Oil Company, of the oil and gas from the said lands, is and will be a continuing trespass upon and against the rights and property of the plaintiffs, for which plaintiffs are without adequate remedy at law, and unless afforded relief in equity they will be without remedy and the acts of the said defendant, Kathleen Oil Company, will work irreparable injury to plaintiffs."

If the defendant, Kathleen Company, has a claim of right, it may be asserted in its answer, or on the trial. If the plaintiffs are willing to set it up in their bill and the defendant is willing to admit that the claim as set up in the bill is correct, all well and good.

> "Yet, no admission of parties can change the law or give jurisdiction to a court in a cause of which it hath no jurisdiction."
>
> —*Hipp* v. *Jolly*, 19 How. 271, 15 L. ed. 633, citing *Welby* v. *Duke of Rutland*, 2 Bro. P. C.

But the defendant may not admit the correctness of plaintiffs' statement of its claim and may set up an entirely different claim.

But assuming that it is proper for plaintiffs to set up defendant's claim, it would only be necessary in this case to allege that subsequent to the execution of plaintiffs' lease the fee owners executed another lease on the same land to the Kathleen Oil Company. That certainly would give rise to no federal question.

—*Shulthis* v. *McDougal,* 225 U. S. 561.

The matter by which plaintiffs seek to inject a federal question is wholly gratuitous and is obviously brought into this bill solely for the purpose of attempting to raise a federal question.

The rule that plaintiffs cannot anticipate defendant's defense applies to equity as well as law cases.

The following cases in which the rule was followed were all equity cases:

Tennessee v. *Union & Planters Bank,* 152 U. S. 454;
Third St. Ry. Co. v. *Lewis,* 172 U. S. 457;
Boston etc. Mining Co. v. *Montana Ore Co.,* 188 U. S. 632;
L. & N. R. Co. v. *Mottley,* 211 U. S. 149;
Shulthis v. *McDougal,* 225 U. S. 561;
Denver v. *New York Trust Co.,* 229 U. S. 123, 133-135.

In fact, the case of *Boston etc. Mining Company* v. *Montana Ore Company* is in so many respects similar to the case at bar that it answers every one of appellants' arguments.

This court there, said:

> "It is quite plain that the various averments contained in the complainant's bill for the purpose of showing jurisdiction in the Circuit Court are wholly unnecessary in order to make out complainant's cause of action for the conversion of ore by the defendants on premises belonging to complainant. To make out a *prima facie* case on the part of complainant, so far as

its right to the ore in question is concerned, all that was necessary was to show the patent and the complainant's possession under it, and from such patent and possession the presumption would be that the complainant was the owner of all ores found within the boundaries contained in the patent extended downward into the earth, and the burden would then rest upon the defendants to show that, notwithstanding such presumption, they had the right to enter upon and take the ore from the ground within the limits described in the patent under which the complainant derives title. It could then prove facts to sustain its averments in regard to ascertain the quantity and value of the ores which the defendants were extracting or might extract from the complainant's premises, and that it would be altogether uncertain and indefinite as to what amount of ores or the value thereof the defendants might extract in the future, and that the complainant would be compelled to rely upon the good faith and showing of the defendants as to the amount and value of the ores which they had theretofore extracted and might thereafter extract from the premises. Indeed, the complainant asserted in the bill, an extract from which is contained in the foregoing statement, that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth, until the contrary has been shown. It would be wholly unnecessary and improper, in order to prove complainant's cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to

reply to such defense, and thus, if possible, to show that a federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper.

"The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defense.

"Conforming itself to that rule, the complainant would not, in the assertion or proof of its cause of action, bring up a single federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or Laws of the United States.

"The only way in which it might be claimed that a federal question was presented would be in the complainant's statement of what the defense of defendants would be, and complainant's answer to such defense. Under these circumstances the case is brought within the rule laid down in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654."

Eliminating the unnecessary allegations in the bill, there is no federal question disclosed.

It is only necessary for the plaintiffs in any event, to allege that their lessors were the owners of the fee. It was unnecessary to go back of the fee owners and trace their ancestry and state the race and blood of the ancestor; and the only purpose for which it could have been done was to show that the capacity of the fee owners to lease was restricted, or that the defendants claimed their capacity was so restricted. If plaintiffs admit that the lessors had no capacity to lease, it would, of course, defeat their bill; if plaintiffs deny it, but assert such was the claim of the defendants, it would simply be anticipating the defense. In either view, such allegations would be of no possible benefit to the plaintiff, except for the obvious purpose of attempting to raise a federal question.

In view of the foregoing, it seems to us clear that there is no federal question properly raised by the bill and, therefore, the decree dismissing the bill was right. Respectfully submitted,

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